Supreme Court,
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In The

Supreme Court of the United States

October Term, 1996

RODNEY DANGERFIELD, an individual,

Petitioner,

vs.

STAR EDITORIAL, INC., a corporation; GP GROUP, INC., a corporation; THE NATIONAL ENQUIRER, INC., a corporation; DISTRIBUTION SERVICES, INC., a corporation; BARRY LEVINE, an individual; DAVID LAFONTAINE, an individual; and DOES 1 through 100, inclusive,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In this age of media conglomerates should the actual malice requirement of *New York Times v. Sullivan* be extended to bar application of the traditional laws of agency and respondeat superior, and thereby allow a media conglomerate to divide up the components of the publishing process in such a fashion as to artificially ensconce the editorial arm in its own corporate shell, so as to avoid liability for defamation and punitive damages?

2. Was the refusal to entertain Dangerfield's arguments for the imposition of alter ego liability on Defendant GP Group, Inc., a drastic departure from the accepted and usual course of judicial proceedings?

3. Where copious evidence of alter ego is admitted without objection, is the denial of leave to amend to specifically allege liability on an alter ego theory, to conform to proof, erroneous under Federal Rule of Civil Procedure 15?

4. Does the decision of the Ninth Circuit affirming the District Court's ruling that it was legally precluded from imposing punitive damages against defendant Star Editorial, Inc. *solely* because Star Editorial, Inc. and its parent (defendant GP Group, Inc.) are structured so that Star Editorial, Inc. owns almost no assets, and thus has minimal net worth, *conflict with* the decision of the California Supreme Court in *Adams v. Murakami* and its progeny?

LIST OF PARTIES

Plaintiff and appellant below is Rodney Dangerfield ("Dangerfield").

Defendants and appellees below are: (1) Star Editorial, Inc. ("Star Editorial"), which was a corporation at the time of institution of the action, but is now designated as a division of America Media Operations, Inc.; (2) and its parent, GP Group, Inc. ("GP"), which changed its name to Enquirer/Star, Inc. and then to American Media Operations, Inc. ("American Media" or "AMOI"). In the Ninth Circuit's Memorandum Decision the names "GP" and "AMOI" are used interchangeably.

The other named defendants (The National Enquirer, Inc.; Distribution Services, Inc.; Barry Levine; and David LaFontaine) have no interest in the outcome.

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LODGING APPENDIX

1 — The Star Magazine Article That Is The Subject Of This Action (Page 20), Along With Cover, The Page Bearing The Subscription Box (Page 2) And The Page Bearing The Editorial Box (Page 8).

2 — An Excerpt Of The January 3, 1995 Edition Of Star Magazine, Consisting Of The Cover And Page 5 (Containing The Subscription Box, Which Shows The Corporate Status/Relationship At Time Of Trial).

Petitioner Rodney Dangerfield ("Dangerfield") respectfully prays that a writ of certiorari issue to review the judgment and opinions of the Ninth Circuit denying Dangerfield's appeal in the above-captioned matter on September 5, 1996, and then denying Dangerfield's Motion for Reconsideration entered in the above-captioned matter on October 21, 1996.

OPINIONS BELOW

The opinion of the trial court (the District Court for the Central District of California, Judge Ronald S.W. Lew presiding) is reprinted as Appendix E.

The order of the Ninth Circuit affirming the District Court is reprinted as Appendix B.

The order of the Ninth Circuit denying Dangerfield's Petition for Rehearing is reprinted as Appendix A.

STATEMENT OF JURISDICTION

On September 5, 1996 the Ninth Circuit filed its judgment in the matter on Dangerfield's appeal, and on October 21, 1996 the Ninth Circuit filed its order denying Dangerfield's Petition for Reconsideration. The jurisdiction of this esteemed Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Federal Rule of Civil Procedure 15 provides, in pertinent part:

> . . . (b) Amendments to conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and *shall* do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(Emphasis added).

STATEMENT OF THE CASE

This is a libel case that was tried before the United States District Court for the Central District of California, Judge Ronald S.W. Lew presiding. On January 18, 1995, at the conclusion of the bench trial, the District Court ruled that plaintiff Rodney

Dangerfield was defamed by statements contained in an article published on September 22, 1990 in the Star magazine, that falsely portray Mr. Dangerfield as an inveterate inebriate who engages in illicit and socially unacceptable behavior. (App. E, p. 23a; defamatory article is lodged as Appendix 1). The District Court found "by clear and convincing evidence that defendant [Star Editorial, Inc.] acted with at least reckless disregard of the truth when it published fabricated anecdotes." (App. E, p. 24a). The District Court further found that Star Editorial "consciously disregarded plaintiff's rights in publishing the fabricated article, and did so with an improper motive," and that the "[p]ublication of the article exhibits common law malice for which exemplary damages may be awarded." (App. E, p. 26a).

At trial, Dangerfield presented evidence showing that Star Editorial and its parent, GP, were *co-publishers* involved in a *single enterprise*. More specifically, the evidence presented at trial, in the form of the uncontroverted deposition testimony of the Chief Financial Officer of GP (David Galpern), who is also an officer of Star Editorial, is that GP employs Star Editorial to create the contents of Star magazine, providing it with only enough cash to pay its editorial staff and maintain its operations (ER4:050; 056).[1]

GP does not "use Star Editorial, Inc. as a profit center" but instead it simply pays its subsidiary the amount that it requires to keep going. All of Star Editorial's revenue comes from GP. (ER4:050, lns. 14-16; 056, lns. 14-16).[2]

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1. It should be kept in mind that GP's name has been changed to American Media Operations, Inc., and is referred to by its new name in Galpern's deposition.

2. The references to "ER" are to Petitioner-Appellant's Excerpts of (Cont'd)

All circulation and advertising revenues generated by Star magazine are collected directly by GP. (ER4:051, lns. 1-4, ln. 22). The District Court ruled that Star magazine has a "circulation of over two million copies per week." (ER7:353). Approximately 40% of the revenue earned by GP was generated by Star magazine. (ER4:053, ln. 9).

Dangerfield made an uncontroverted showing that GP orchestrates all non-editorial aspects of publication. All facets of this enterprise *are handled and paid for* by GP or one of its subsidiaries, from the purchasing of the newsprint on which it is printed (ER4:024, lns. 6-8), to the printing of the Star magazine (ER4:023, lns. 20-25; 024, ln. 1), to the distribution of the magazine (ER4:029, lns. 12-23; 032, lns. 8-11) and the stocking of the supermarket racks from which the Star is most frequently sold (ER4:029, lns. 12-23). Further, GP supervises the production of all publications. (ER4:027, lns. 8-21). GP implemented a multi-million dollar advertising campaign in support of a price increase for Star magazine. (ER4:067, ln. 16).

While Star Editorial, Inc. was formed after the acquisition of Star magazine in 1990 — allegedly because this structure produces favorable tax consequences (ER4:47, lns. 4-7; 50, lns. 2-6) — according to an inscription on the tabloid magazine itself, at the time of trial Star magazine was published by the "Star Division" of AMOI (the new name for GP). That division, according to the uncontradicted testimony, is not a distinct entity but rather is an "operating area" of American Media (the new name for GP) (ER4:21, lns. 6-12, 7-19; 22, lns. 9-10).

(Cont'd)
Record, filed in support of his appeal to the Ninth Circuit. (The numbers following "ER" refers to the index tab under which the evidence is presented, and the specific pages being cited. The pages of Petitioner-Appellant's Excerpts of Record are consecutively numbered with the prefix "AOB".)

Thus, the District Court was confronted with overwhelming uncontroverted evidence that GP is neither a detached corporate parent nor a mere printer or distributor who, notwithstanding the discrete services they perform, play no comprehensive role in the publishing process. Rather, GP is the mastermind behind the massive, multi-faceted publishing operation that produces Star magazine. Star Editorial, Inc. never functioned as an independent corporation but instead was merely the instrumentality through which GP conducted the editorial operations of Star magazine. Dangerfield asserts that GP is subject to liability because GP served as co-publisher with Star Editorial, and as such GP is liable under the principles of agency and respondeat superior.

However, at trial the District Court dismissed GP on the ground that the "plaintiff has failed to show that the GP Group, now known as the American Media Operations, Inc., was sufficiently involved in the publication of the article." (App. E, p. 22a). In support of this ruling, the District Court stated:

> The general rule is that the entity must take a responsible part in the publication of the defamatory material for liability. I cite Osmond v. EWAP, Inc. 153 Cal. App. 3d 842.
>
> The case law has held that distributors and other entities which do not know and have no reason to know of the libellous material are not libel [sic] for defamation. There is no evidence that GP Group took a responsible part in causing the article to be published. Thus, liability cannot be attached to GP Group.

(App. E, p. 22a).

Thus, the District Court found only defendant Star Editorial liable for defamation and awarded damages for emotional distress in the nominal sum of $1, actual damages for injury to reputation in the nominal amount of $1, and awarded presumed damages in the amount of $45,000. (App. E, pp. 25a-26a). However, the District Court concluded that it was "legally precluded from imposing punitive damages against Star [Editorial] despite Star Editorial's reprehensible conduct," because "plaintiff has failed to submit evidence showing that the financial net worth of the Star would allow the imposition of punitive damages," in that "Plaintiff has introduced clear evidence showing that the Star [Editorial] and its parent, GP, are structured so that the Star owns almost no assets." (App. E, p. 26a).

Thereafter, Dangerfield made a motion for a new trial pursuant to Federal Rule of Civil Procedure 59(a) and (e). The motion was made on the ground that the District Court's granting of GP's Rule 52(c) motion, that GP took no responsible part in causing the defamatory article to be published, is against the weight of the evidence and is *contrary to applicable law.* (ER9:357-397).

The District Court denied the motion for new trial. (App. C). Appeal to the Ninth Circuit followed.

The Ninth Circuit's ensuing Memorandum Decision held that dismissal of GP was proper under *Cantrell v. Forest City Publ. Co.*, 419 U.S. 245 (1974). The Ninth Circuit stated:

> Dangerfield seems to argue that simply because GP published the article, it is necessarily liable, But under Cantrell, publication alone is not enough; rather, Dangerfield must also prove that GP acted

> with malice. We have reviewed the record and agree that there is no evidence that GP acted with malice. The editorial responsibility was strictly with Star [the then subsidiary]. There is no evidence that GP had any involvement at all in the investigation of, writing of, fact checking or editing of the article. At most the evidence shows that GP supervised the non-editorial aspects of publishing and distributing Star magazine. To the extent that Dangerfield is attempting to impute Star magazine's malice to GP, either under a respondeat superior or agency theory, these arguments also lack merit. . . .

(App. B, pp. 6a-7a). The Ninth Circuit did *not* elaborate on the substantive reasons why the doctrines of respondeat superior and agency lack merit, other than to characterize them as similar to Dangerfield's alter ego arguments. (*Id.*).

At trial, Dangerfield also argued that Star Editorial was the alter ego of GP. The District Court refused to entertain Dangerfield's alter ego liability arguments, because the District Court concluded that alter ego had not been specifically plead. Dangerfield's motion for new trial also challenged this ruling, and argued that GP's denial of liability as the responsible publisher served to authorize the reception of evidence to establish liability upon the principle of alter ego. Before the District Court was an abundance of evidence establishing Star Editorial's alter ego status.[3]

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3. The uncontroverted evidence admitted without objection showed that Star Editorial's assets were commingled with those of GP, that Star Editorial's assets have been pledged to secure its parent's debts, and that GP has *treated the assets of Star Editorial, Inc. as its own.* (ER4:54-56). Even in its internal

(Cont'd)

Concurrently with the motion for new trial, Dangerfield moved for leave to file a Third Amended Complaint to assert alter ego allegations that conform to proof. (ER9:357-397). The District Court denied Dangerfield's motion for leave to file a Third Amended Complaint. The Ninth Circuit reviewed the District Court's decision not to entertain the evidence of alter ego liability and not to allow amendment of the complaint on an abuse of discretion standard and found no error.

(Cont'd)
financial documents, GP does not prepare any balance sheets which shows Star's assets separately. (ER4:053). Further, the *boards of directors of the two corporations overlap*, such that all but one of Star Editorial's seven directors are also directors of American Media Operations, Inc., and the officers of the two corporations overlap, such that all but two of Star Editorial's nine officers are also officers of American Media Operations, Inc. (ER4:232 and 237). The two companies also employ the same attorneys, as evinced by the fact that both are represented by the same counsel in this case.

There is ultimately identical ownership in the two companies. American Media, Inc. (the holding company parent of GP) has no assets other than its interest in GP (now American Media Operations, Inc.). GP is the sole shareholder of Star Editorial, Inc. (ER4:039, lns. 11-17; 083, lns. 24-25; 084, lns. 1-2).

The evidence also established that Star Editorial is undercapitalized to engage in the business of publishing a high circulation national tabloid. As detailed above, all non-editorial aspects of publication are financed and conducted by GP and its subsidiaries, and *all* of Star Editorial's revenue comes from GP. (ER4:050, lns. 14-16). Star Editorial has no significant assets, as born out by its balance sheets (ER4:144-146); although, on appeal it was admitted that there is an insurance policy covering Star magazine. All valuable assets of Star magazine (including its trademark, its anti-competition agreement, and its goodwill) are held by GP. This fact is also born out by Galpern's testimony that the increase in the stockholder's equity in GP from $68 million dollars to $255 millon dollars was due to the acquisition of Star magazine in 1991. (ER4:060, lns. 1-3).

As to punitive damages, the District Court concluded that it was "legally precluded from imposing punitive damages against the Star, despite its reprehensible conduct," in having "fabricated anecdotes" because "Plaintiff has failed to submit evidence showing that the financial net worth of the Star would allow the imposition of damages," in that the evidence shows that the Star "owns almost no assets". (ER7: p. 351, ln. 21; pp. 353-354). Dangerfield's motion for new trial argued that the egregious conduct in this case requires an award of substantial punitive damages, which would be supported by the substantial financial condition of GP (whose true net worth, after adjustment, is at least $61,254,000 as of December 26, 1994)[4]; by the revenues from Star magazine which are diverted to GP, and; by the value of Star magazine's trademark, core reader base, anti-competition agreement, and goodwill (which is held by GP and valued at 395 million dollars)[5].

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4. The evidence shows that the net worth of GP projected as of December 26, 1994, is $36,535,000 (ER4:297-298). GP's true net worth, after adjustment, is at least $61,254,000 as of December 26, 1994, as born out by Galpern's testimony that the balance sheet liability denominated "deferred revenues" is not a true liability but instead represents prepaid amounts which are realized as income when the magazine is published. (ER4:061, lns. 17-25; 062, lns. 1-23). The company's Form 10K is in accord. Once these deferred revenues of $24,719,000 are deleted from the liability column, it is apparent that true net worth of GP Group as of December 26, 1994, is at least $61,254,000.

Further, when dividends paid are added back, the net worth is $353,502,000. (In 1994 a dividend was declared by GP to its holding company parent in the amount of 292 million dollars, which is shown on the balance sheets as a liability. (ER4:76, lns. 12-20). In evaluating the financial position of a defendant for purposes of assessing punitive damages, dividends payable are to be deleted from liabilities. *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610, 642 (1984).)

5. ER4:45-46 (the testimony of GP Chief Financial Officer and Star Editorial Officer David Galpern).

The Ninth Circuit affirmed the District Court's ruling on punitive damages because the Panel concluded that "Dangerfield's introduction of GP's net worth without isolating Star's balance" makes the case analogous to *Tomaselli v. Transamerica Ins.*, 25 Cal. App. 4th 1269, 1282-1283, 31 Cal. Rptr. 2d 433, 441 (1994). (App. B, p. 9a). Dangerfield submits that this conclusion betrays a gross misapprehension of the evidence in the record. Moreover, the Ninth Circuit's ruling fails to acknowledge the District Court's error in interpreting California law as imposing a rigid net worth standard for punitive damages.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to prevent the improper extension of the actual malice standard established in *New Times v. Sullivan*. The rulings below have applied the actual malice standard in a fashion that precludes application of the traditional doctrines of agency and employer/employee liability, so as to allow a publishing entity to insulate itself from defamation liability simply by erecting an artificial corporate wall around its impecunious editorial arm.

If the decision that GP cannot be held liable is allowed to stand, it will be viewed as an invitation to all wealthy tabloid publishers to form asset-less subsidiaries to serve as the nominal employers of their journalists. So insulated, those publishers would be able to turn a blind eye to the calumnies that are published in the pages of their tabloids. The notion that such publishers should not be held accountable for defamation, and that their assets should be inviolate, offends all notions of fairness and justice. More important, it is not required by the Supreme Court's actual malice jurisprudence.

The result of the rulings below is an extraordinary windfall

for media conglomerate GP: Make hundreds of millions of dollars in profit by publishing false and defamatory material, completely insulated from any financial risk from libel claims. No wonder the corporation was able to say in the prospectus for its $200,000,000 subordinated note offering that the ten libel-based lawsuits in which it was involved as of September 30, 1994, would ". . . not have a material adverse impact on the Company's consolidated financial position or results of operations." (ER4: Ex. 240 at p. 162).

The District Court's conclusion that GP is immune from liability because it played no responsible part in the publication of Star magazine, reflects a view that is sharply out of touch with the realities of modern publishing and the evidence in this case. The uncontroverted evidence in this case properly renders GP liable as the owner or co-publisher of Star magazine, unless the actual malice standard is interpreted to bar application of the doctrines of respondeat superior and agency.

Other reasons which support the grant of writ review concern the District Court's refusal to entertain Dangerfield's alter ego arguments. In addition, the rulings that the minimal net worth of Star Editorial precludes an award of punitive damages raises a *conflict* with the California Supreme Court's decision in *Adams v. Murakami*, 54 Cal. 3d 105, 284 Cal. Rptr. 318 (1991), and its progeny.

I. The Actual Malice Standard Prescribed by *New York Times v. Sullivan* Does Not Bar Application of the Traditional Doctrines of Agency and *Respondeat Superior* to Render GP Liable As the Owner or Co-Publisher of Star Magazine.

There is no dispute that under *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *St. Amant v. Thompson*, 390 U.S. 727 (1969), it must be shown that defamatory statements concerning

a public figure libel plaintiff were made with actual malice on the part of the reporters and/or editors actually working on the article, showing some serious doubts as to truth. Where, as here, however, the editorial arm of a publication is found to have acted with actual malice, that actual malice should suffice to render the corporate owner or co-publisher liable pursuant to the doctrines of respondeat superior and agency. To hold otherwise is to improperly extend the actual malice standard.

This Court's decisions have clearly established that the traditional doctrine of respondeat superior is applicable in defamation cases. Indeed, the very case which the Ninth Circuit Memorandum Decision cites for the proposition that actual malice must shown as to each defendant, *Cantrell v. Forest City Publishing*, 419 U.S. 245 (1974) (App. B, p. 6a), authorizes the imposition of liability for defamation under the doctrine of respondeat superior:

> The Court of Appeals concluded that there was no evidence that Forest City Publishing Co. had knowledge of any of the inaccuracies contained in Eszterhas' article. However, there was sufficient evidence for the jury to find that Eszterhas' writing of the feature was within the scope of his employment at the Plain Dealer and that Forest City Publishing Co. was therefore liable under the doctrines of *respondent superior*. . . . Forest City Publishing Company, publisher of the Plain Dealer should be held vicariously liable for the damage caused by the knowing falsehoods contained in Eszterhas' story.

Cantrell, 419 U.S. at 253 (reversing judgment of the Court of

Appeals). *See also Masson v. The New Yorker Magazine*, 895 F.2d 1535, 1568, n. 24 (9th Cir. 1989) (dissenting op., J. Kozinski) (acknowledging that *Cantrell* allows for *respondeat superior* liability).

The very case which the District Court cited in support of its holding that GP could not be held liable, *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852 (1984) (App. E, p. 22a), was wrongly applied by the District Court and actually supports the imposition of liability on GP. In *Osmond*, the court found that a seller of pornographic films was not subject to liability because it had not played a responsible part in the publication of the film. *Id.* As the court stated: "One who merely plays a secondary role in disseminating information published by another, as in the case of libraries, news vendors, or carriers, may avoid liability by showing there was no reason to believe it to be a libel." *Id.* GP, however, is no mere third party distributor. Indeed, the rulings below interpret the actual malice standard in a fashion that fails to make any distinction at all between one who simply plays a secondary role in disseminating information published by another, and one who serves as the owner or co-publisher of a publication. By "co-publisher" is meant one who is engaged with a another in the *single enterprise* of publishing a magazine or newspaper, etc. As such, GP is responsible for the tort actions of its *de facto* editorial and reporting employees. GP is also liable based on principles of agency.

The rulings below create the very situation about which the Eighth Circuit wisely warned in *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 476 (8th Cir. 1987), *cert. denied*, 45 U.S. 970 (1987):

> In refusing to hold the Globe liable here based only on the McCoy's knowledge, we neither grant newspapers free reign to rely

> on deceitful employees nor establish a rule so inflexible as to create the specter Speer suggests of newspapers *shielding themselves from liability by separating the writing and reporting functions.*

(Emphasis added).

Indeed, several other courts have considered the need to insure that the responsible corporate entity is subject to liability for defamation. California courts have uniformly held that "the general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation." *McGuire v. Brightman*, 79 Cal. App. 3d 776, 789 (1978); *see also Jones v. Calder*, 138 Cal. App. 3d 128, 136 (1982). While it is true that one "whose *only* involvement in the publication of a libelous magazine article is *ownership of shares* in the publishing company cannot be held personally liable for the defamatory article," *Matson v. Dvorak*, 40 Cal. App. 4th 539, 549, 46 Cal. Rptr. 2d 880 (1995) (emphasis added), *the evidence of GP's role goes far beyond share ownership.* The claim for GP's direct liability as a co-publisher is based on the significant role GP plays in publishing the Star magazine, as well as GP's direct collection and retention of all revenues from the sale of the tabloid magazine.

In *Karaduman v. Newsday, Inc.*, 51 N.Y. 2d 531 (1980), the court stated: "Any publication, whenever made, by the corporation must be judged in the light of all relevant corporate activity." *Id.* at 553. *See also Prozeralik v. Capital Cities Communications, Inc.*, 593 N.Y.S. 2d 662, 665 (1993) (reversed on other grounds and remanded for new trial):

> Defendant cannot avoid liability for WKBW Radio's republication of Channel 7's

> defamatory statement, because the original publisher and the republisher *are part of the same enterprises, owned by defendant.* (Citations omitted). "Any publication whenever made, by the corporation must be judged in light of all relevant corporate activity." (quoting *Karaduman*, 51 N.Y. 2d at 553). Because the original television broadcast was made with actual malice, defendant is responsible for its republication on WKBW Radio. (Emphasis added).

Further, as the Supreme Court of Appeals of West Virginia stated in *Crain v. Lightner*, 178 W. Va. 765, 772 (1987):

> There may be more than one "publisher" of libel. If, as a conspiracy, one person orally composes and dictates the statement, a second person sees that the composition is reduced to written or printed form and a third person brings the statement in such form to the attention of anyone other than the person defamed, each of the three persons who contributed to the communication is responsible as a "publisher" of libel.

In the case at bar, rather than a technical conspiracy, we have a situation of co-publishers — entities engaged in the single enterprise of publishing the Star magazine. GP was neither a detached corporate parent nor a mere printer or distributor who plays no comprehensive role in the publishing process. Rather, GP was the mastermind behind the multi-faceted publishing operation that produces Star magazine.

The District Court was confronted with overwhelming

uncontroverted evidence (from the deposition of the Chief Financial Officer of GP and an officer of Star Editorial: David Galpern) that Star Editorial never functioned strictly as an independent corporation, but instead was a co-publisher along with GP. The efforts of Star Editorial, Inc. in news gathering, writing and editing can clearly fall into the category of the activities of an *agent* of GP. This is consistent with the fact that GP directly receives all of the revenues generated by the sale of the Star magazine and advertising material in the Star, and further that GP meters out the monies to pay the salaries of the Star Editorial employees.

GP has simply utilized Star Editorial, Inc. for the purposes of disseminating tabloid journalism, often including defamatory material, and insulating itself from liability. It seems improper that a corporation with a net worth, before adjustment for dividends, of over $350,000,000 can reap huge profits from the publication of tabloid material of the type demonstrated in the case at bar, without any fear of liability. Such a result defies both logic and the law.

Petitioner Dangerfield respectfully submits that these issues warrant this Court's consideration.

II. The District Court's Refusal To Entertain Dangerfield's Arguments For Alter Ego Liability Represents A Drastic Departure From The Accepted And Usual Course Of Judicial Proceedings.

GP was a named defendant in the action from its inception, and shared counsel with Star Editorial. Nonetheless, the District Court refused to entertain Dangerfield's alter ego arguments on the ground that alter ego was not specifically alleged in the complaint.

This ruling was error because the failure to plead alter ego does not remove the issue from the case. As stated in *Pan Pacific Sash & Door Co. v. Greendale Park, Inc.*, 166 Cal. App. 2d 652, 655 (1958):

> . . . where a defendant is charged with liability his denial thereof is sufficient to authorize the reception of evidence to establish such liability upon the principle of the alter ego. . . .

A similar pronouncement was earlier issued by the California Supreme Court in *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 523 (1949):

> It is contended by the defendant that the issue of whether there existed an alter ego relationship was not pleaded and was therefore not before the trial court. [However, d]efects in the complaint may be cured by allegations of the answer.

As stated in *Auer v. Frank*, 227 Cal. App. 2d 396, 403-04 (1964) (emphasis added), the court of appeal again held that:

> [A defendant's] denial [of liability] is sufficient to establish [the propriety of a finding of] such liability upon the principle of alter ego *even though the complaint is devoid of such an allegation*. (Citations omitted). This is the situation presented by the circumstances of the instant case. Not only do defendants deny liability but they affirmatively assert in their brief that the liability sought to be established by plaintiff

> is not that of defendants, as individuals, but that of the corporation.

Precisely this situation exists here. Defendant GP has denied liability on the ground, *inter alia*, that it played "no responsible part" in the publication of the libel. At the heart of that defense are the tacit assertions that (1) the material in question *was* published; and (2) *some other entity* was the "responsible publisher." Thus, GP itself placed at issue the question of who the responsible publisher is. As stated in *Wilson v. Nobell*, 119 Cal. App. 2d 341, 348 (1953):

> Although there was no direct issue raised by the pleadings that the Nobell Research Foundation was the alter ego of Albert Nobell it was not prejudicial under the circumstances to admit evidence on that question. Both Nobell and the Foundation were parties to the action and represented by the same counsel. Nobell was a principal witness and in possession of all the facts relative to the creation of the foundation and its relation to him.

As the District Court in this case well knew, both Star Editorial and GP were parties to this action since its inception and both were represented by the same counsel. GP denied defamation liability and held Star Editorial out as the responsible party. Under these circumstances, the District Court should have found that the alter ego issue had been raised. Petitioner Dangerfield submits that the District Court's refusal to entertain Dangerfield's alter ego arguments represents a drastic departure from the accepted and usual course of judicial proceedings and, as such, warrants this Court's review.

III. The Denial of Leave To Amend A Complaint To Specifically Allege Alter Ego, To Conform To Copious Proof Admitted Without Objection, Is An Erroneous Application of FRCP 15.

The District Court's refusal to permit Plaintiff to amend his complaint to allege liability on an alter ego theory was based on an erroneous interpretation of Federal Rule of Civil Procedure 15. In denying Dangerfield's motion for leave to amend, the District Court relied upon *In Re Acequia, Inc.*, 34 F.3d 800 (9th Cir. 1994), for the proposition that "plaintiff [has] failed to show that defendants implicitly consented to litigate under the alter ego theory." (App. C, p. 12a). *Acequia*, in turn, cites Rule 15(b)[6] which provides in relevant part that: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they *shall* be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15(b) (emphasis added).

Before turning to the misapplication of this provision, it should be emphasized that Rule 15(b) permits amendment to be made to pleadings to conform to evidence adduced at trial. Further, it permits an amendment to be made *at any time* on the motion of any party — even at the appellate level. 3 James W. Moore *et al.*, Moore's Federal Practice ¶ 15.13(2) (1974), and cases cited therein; *Dunn v. TransWorld Airlines, Inc.*, 589 F.2d 408 (9th Cir. 1978). The same section of the rule

> . . . also provides that even if evidence is objected to on the ground [that] it is not within the issues made by the pleadings, "the court may allow the pleadings to be amended and *shall* do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to

6. 34 F.3d at 814.

> satisfy the court that the admission of such evidence would prejudice him."

Slavitt v. Kauhi, 384 F.2d 530, 533 (9th Cir. 1967) (quoting Fed. R. Civ. P. 15(b)) (emphasis added).

Guided by the principle that "leave to amend shall be freely given when justice requires," an abuse of discretion was found in refusing to grant leave to amend, in *Kirk v. United States*, 232 F.2d 763, 770 (9th Cir. 1956), for reasons analogous to the situation here:

> After all, the plaintiffs were seeking no more than to make the complaint conform in these respects with the assertions made by the defendant itself in its own answers to interrogatories and responses to requests for admissions. For the court to say: No, you pleaded it that way the first time and although it is admitted by the defendant that the facts are otherwise, yet you will be held to your original allegation, seems to us to be wholly unwarranted and a ruling operating to avoid ascertaining the true facts in the case.

Clearly, Petitioner's objective in moving to amend in the instant case was identical to that of plaintiff in *Kirk*. In this case, the motion to amend was made after copious evidence of an alter ego relationship between Star and GP had been introduced as part of Dangerfield's case in chief — *without objection*. GP was, at all times, a party to the litigation, and permitted the admission of this evidence without restriction (ER5:299-301). Therefore, GP cannot reasonably take the position that the admission of such evidence caused it to incur undue prejudice. Further, in his closing argument, Dangerfield's

counsel went through the litany of alter ego criteria and cited facts which support the existence of each criterion in this case, without response or objection. (ER6:309-311, 340).

It is evident that the District Court failed to follow Rule 15(b)'s mandate that issues not raised by the pleadings shall be tried in all respects as if they had been raised therein if these issues are tried by implied consent. *See, also Slavitt*, 384 F.2d at 534; *Casey v. Lewis*, 43 F.3d 1261 (9th Cir. 1994).

Because of the mandatory nature of Rule 15(b), the District Court's failure to either permit amendment or treat the alter ego issues as though it had been pled, was an error of law. Review, therefore, should be *de novo*. *Liberty Mutual Insurance Co. v. EEOC*, 691 F.2d 438, 440 (9th Cir. 1982). *See also Jenkins v. Kaneko*, 785 F.2d 720, 736 (9th Cir. 1986). The Ninth Circuit, however, erroneously affirmed the District Court's ruling based on a mere abuse of discretion standard, and erroneously concluded that there had been no implied consent. Petitioner Dangerfield respectfully submits that these issues warrant this Court's review.

IV. California Law on Punitive Damages Does Not Employ A Rigid Net Worth Standard.

The District Court's ruling that, "much to its regret this court . . . is *legally precluded* from imposing punitive damages against the Star, despite the Star's reprehensible conduct," because Star Editorial and its parent "were structured so that the Star owns almost no assets," *was based on an erroneous interpretation of California law*. (App. E, p. 26a). In denying punitive damages, the District Court wrongly interpreted California law as imposing a rigid "net worth" standard for punitive damages. (App. E, p. 26a). The Ninth Circuit's failure to recognize and correct this error raises a conflict with the California Supreme Court's

decision in *Adams v. Murakami*, 54 Cal. 3d 105, 110, 112-116, 284 Cal. Rptr. 318 (1991), which warrants this Court's review.

In *Adams v. Murakami*, the California Supreme Court held that under California law meaningful evidence of the defendant's "financial condition" must be presented as a prerequisite to a punitive damage award. *Adams v. Murakami*, 54 Cal. 3d 105, 110, 112-116, 284 Cal. Rptr. 318 (1991). The court's standard also speaks in terms of the "defendant's ability to pay" (*id.* at 112), and "net worth" (*id.* at 111, 113-114). However, the California Supreme Court expressly *declined* "to prescribe any rigid standard for measuring a defendant's ability to pay," in response to the defendant's contention that the "best measure of his ability to pay is his net worth." *Id.* at 116, n. 7. The Court also declined to rule out "the profitability of the defendant's misconduct as the proper measure." *Id.*

Thus, the rigid net worth approach which the rulings below apply is simply not an accurate interpretation of California law. This precise point was made in *Cummings Medical Corp. v. Occupational Medical Corp.*, 10 Cal.App. 4th 1291, 1299 (1992) (emphasis added):

> Although appellate courts have sometimes used the terms "wealth," "financial condition" and "net worth" interchangeably [citations], clearly these terms are not synonymous. And, while "net worth" is probably the financial measurement most often used in settling the amount of punitive damages, no court has held that it is the *only* permissible measurement . . .
>
> As the court in *Adams* recognized *the key question* before the reviewing court *is not*

> *"what is the defendant's net worth."* Rather, the question is "whether the amount of damages 'exceeds the level necessary to properly punish and deter.' "

Id. at 1299 (citations omitted). (emphasis added). As the court stated in *Washington v. Farlice*, 1 Cal. App. 4th 766, 775 (1991): "The [*Adams*] Court realized [that] any particular measure of financial condition may not be appropriate in all cases."[7] This was also recognized in the recent case *Stevens v. Owens-Corning Fiberglass Corp.*, 49 Cal. App. 4th 1645, 1659-60 (1996). *See also Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994) (looking at the "financial position" of the defendant).

The District Court misinterpreted the sole case it cited in support of its rigid net worth standard, *Kenly v. Ukegawa*, 16 Cal. App. 4th 49 (1993). (App. E, p. 26a). In *Kenly*, the court stated that it was "convinced that in most cases there must be evidence of the defendant's net worth in order to support the defendant's punitive damage award." *Id.* at 57 (remanding, because evidence of net worth was lacking). The language immediately following

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7. *See also Douglas v. Ostermeier*, 1 Cal. App. 4th 729, 749, 2 Cal. Rptr. 2d 594 (1991), considering testimony on the value of business property owned by the defendant (an individual); *Hopkins v. Dow Corning Corp.*, 33 F.3d at 1127 (considering evidence of the financial gain that flowed from the sale of the defendant's product).

The case *People v. Toomey*, 157 Cal. App. 3d 1, 203 Cal. Rptr. 642 (1985), provides a useful analogy. The court considered whether the imposition of a penalty for unfair business practices was excessive, utilizing the principles for review of exemplary damages. *Id.* at 24. The court relied on evidence of the sales and profits of the corporate business which the individual defendant and his wife operated. The $3,500 per month salary which the individual defendant received from the corporation was not controlling, even though the corporation was not a defendant and no alter ego liability was imposed upon the corporation. *Id.* at 25.

this sentence, however, shows that *financial condition* remains the proper standard. The *Kenly* court's point about net worth was that evidence of liabilities must usually also be introduced so that a *meaningful picture of financial condition* is presented, so as to avoid the "potential of its crippling or destroying the defendant . . ." *Id.* at 578. *See also id.* at 57, n. 7. The District Court clearly misinterpreted *Kenly.*

The Ninth Circuit failed to recognize that the District Court had misinterpreted California law and applied a rigid net worth standard. Further, the Ninth Circuit's conclusion that "Dangerfield's introduction of GP's net worth without isolating Star's balance" makes the case analogous to *Tomaselli v. Transamerica Ins.*, 25 Cal. App. 4th 1269, 1282-1283, 31 Cal. Rptr. 2d 433, 441 (1994) (App. B, pp. 8a-9a), betrays a gross misapprehension of the evidence in the record.

In *Tomaselli v. Transamerica Ins., supra*, the court did *not* prescribe a rigid rule that financial condition of a subsidiary cannot be shown with evidence denominating the financial condition of the parent. Rather, the court held that the record did not support an award of punitive damages against the subsidiary because there was *no* evidence of the subsidiary's *financial condition*, for the reason that the plaintiff had introduced *only* a consolidated financial statement for the parent and all of its many subsidiaries and the annual report contained *no separate information* on the subsidiary's financial status. *Tomaselli*, 25 Cal. App. 4th at 1283, 31 Cal. Rptr. 2d at 441. Therefore, the plaintiff had failed in his burden of producing meaningful evidence of financial condition, as established by the California Supreme Court in *Adams v. Murakami, supra*, 54 Cal. 3d at 110-111, 119.

Here, by contrast, the record contains uncontradicted testimony by GP Chief Financial Officer and Star Officer David

Galpern, *specifically allocating* $395 million dollars of assets hidden amongst GP's financial statements, to Star magazine's *trademark*, readership, not to compete agreement and goodwill. More specifically, Galpern testified that when the assets of Star magazine were acquired by GP for 400 million dollars, AMOI (formerly known as GP) made an allocation on its books and records of that purchase price. (ER4:45, lns. 1-8, lns. 21-25). Galpern testified that "*148 million* was [allocated as] the trademark. 35 million dollars was [allocated as] the core reader base [and] 12 million dollars was the not to compete agreement . . . [and . . . 200 million was allocated] "to goodwill". (ER4:46, lns. 1-17). Thus, Appellant introduced evidence showing that the "Star Editorial Balance Sheet as of March 28, 1994" prepared by Appellants fails to accurately set forth Star Editorial's net worth (ER 4:123, which is exhibit 238 to Galpern's deposition). The aforecited assets of Star Editorial which have been hidden amongst GP's balance sheet, but exposed by Galpern's testimony and valued at $395 million dollars, is evidence of financial condition which supports an award of punitive damages.

Also overlooked was testimony by GP's Chief Financial Officer (Galpern) that approximately 40% of the revenues shown on GP's financial statements are revenues that were generated by Star magazine but were collected and retained by GP. (ER4:53, lns. 2-9). (*Tomaselli*, by contrast, did not deal with a situation involving diversion of revenues to the parent corporation!). Thus, the income listed on Star's "Statement of Operations" (ER4: p. 124) is not a true representation of Star's financial condition. Indeed, Galpern testified that this revenue represented only monies that American Media Operation, Inc. (formerly GP) meters out to Star Editorial to keep it going. (ER4: pp. 50-51).

Further, the Ninth Circuit failed to give any credence to the

fact that Star Editorial, Inc. is now the new name of an *inactive* subsidiary of American Media Operations, Inc. (formerly GP). (ER4:048, lns. 2-9; 049, lns. 1-25). According to an inscription on the tabloid magazine itself, Star is now published by the "Star Division" of American Media Operations, Inc. (Lodged App. 2). That division is not a distinct entity but rather is an "operating area" of American Media Operations, Inc. (ER4:021, lns. 6-12, 17-19; 022, lns. 9-10). This is significant because several California courts have held that an award of punitive damages usually should be based on the defendant's financial condition at the time of trial, rather than the time of injury (here, 1990). *Dumas v Stocker*, 213 Cal. App. 3d 1268 (1989) (approved of on several grounds in *Adams v. Murakami, supra*). *Washington v. Farlice, supra*, 1 Cal. App. 4th at 777. However, this important point was *never addressed* by the Ninth's Circuit's Memorandum Decision.

One point that was acknowledged by Ninth Circuit but left unresolved, was the significance of GP's and Star Editorial's judicial admission on appeal that an insurance policy, which their corporate designee (Galpern) had identified as a policy in the name of the parent corporation of GP's parent (ER4:68), *is in fact a policy in the name of Star*, that is available to "compensate any persons foreseeably damaged by publication." (Appellees' Brief to the Ninth Circuit, p. 17). In his reply brief before the Ninth Circuit, Dangerfield points to this judicial admission as proof that Galpern misled the District Court when he testified that Star had minimal assets. However, the categorization of insurance as an asset of Star Editorial contributing toward its net worth was "not considered" by the Ninth Circuit for the sole stated reason that the Court mistakenly believed that the insurance "is not in the record." (App. B, p. 8a, n. 3). In truth, however, evidence of insurance was in the trial record. As noted above, it was testified to in the Galpern

Deposition, which was offered into evidence. (ER 4:80-81). The consideration of insurance is a subsidiary issue.[8]

Petitioner Dangerfield respectfully submits that the conflict between the rulings below and the decision of the California Supreme Court in *Adams v. Murakami*, warrants review by this Court. The District Court's expression of regret at its inability to award punitive damages against Star Editorial, Inc. is significant. That, along with its findings of "reprehensible conduct" and the "conscious[] disregard[] of the plaintiff's rights in publishing a fabricated article . . . with an improper motive," show that the District Court would have awarded punitive damages to punish and deter, but for the fact that California law was erroneously interpreted as imposing a rigid net worth standard. (App. E, p. 26a).

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8. In support of their argument that the insurance policy constitutes sufficient resources to compensate any person foreseeably damaged by its publications, such as would tend to negate a finding of alter ego, Appellees GP and Star Editorial cited *Radaszweski v. Telecom Corp.*, 981 F.2d 305, 310 (8th Cir. 1992), wherein the court held that "[i]nsurance is unquestionably relevant on the issue of 'undercapitalization.' " Another relevant case is *National Fire Ins. Co. of Pittsburgh v. City Sav.*, 28 F.3d 376, 384 (3d Cir. 1994), where the court found that under the Financial Institution Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. § 1821(d)(3)), insurance policies were considered assets of a corporation. As the court stated, "Furthermore, we believe that business people consider an insurance policy to be an asset of the named insured, as the term 'asset' is commonly used in the business world." *National Fire Ins. Co.*, 28 F.3d at 384.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 21, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55387
D.C. No. CV-91-02123-RSWL

RODNEY DANGERFIELD,

Plaintiff-Appellant,

vs.

STAR EDITORIAL, INC., a corporation; GP GROUP, INC., a corporation; THE NATIONAL ENQUIRER, INC., a corporation; DISTRIBUTION SERVICES, INC., a corporation; BARRY LEVINE, an individual; DAVID LAFONTAINE, an individial,

Defendants-Appellees.

Before: BRUNETTI and RYMER, Circuit Judges, and TANNER,** District Judge.

Appellant's petition for rehearing is denied.

** Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 5, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55387
D.C. No. CV-91-02123-RSWL

RODNEY DANGERFIELD,

Plaintiff-Appellant,

vs.

STAR EDITORIAL, INC., a corporation; GP GROUP, INC., a corporation; THE NATIONAL ENQUIRER, INC., a corporation; DISTRIBUTION SERVICES, INC., a corporation; BARRY LEVINE, an individual; DAVID LAFONTAINE, an individual,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and submitted June 5, 1996
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appendix B

Before: BRUNETTI and RYMER, Circuit Judges, and TANNER.** District Judge.

Rodney Dangerfield appeals the district court's denial of his motion for a new trial and motion for leave to amend his complaint in his libel suit against appellees Star Editorial, Inc. ("Star") and GP Group, Inc. ("GP")[1]. We have jurisdiction over this timely appeal. 28 U.S.C. § 1291. We affirm.

I. *Background.*

The September 20, 1990 issue of Star Magazine contained an article about Rodney Dangerfield, a well known comedian, headlined "Vegas Casino Accuses Caddyshack Funnyman: Rodney Dangerfield Swills Vodka by the Tumblerful, Smokes Pot All Day and Uses Cocaine." Appellant Dangerfield filed a libel suit against Star and GP (Star's parent corporation). Star publishes Star Magazine. The complaint listed Star and GP as separate entities and did not allege an alter ego theory.

The district court held a bench trial during January 1995. After the presentation of the plaintiff's case, appellees made a motion for judgment on partial findings.[2] The district court

** Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

1. GP Group changed its name to Enquirer/Star, Inc. and then to American Media Operations, Inc. ("AMOI"). The names are used interchangeable.

2. Appellees called this motion a motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b). The district court stated that the motion was more appropriately characterized as a motion for judgement on partial findings pursuant to Fed. R. Civ. P. 52(c).

denied the motion as to Star, but granted the motion as to GP. The district court found no evidence that GP took a responsible part in causing the article to be published, so GP was not liable for the libel. Consequently, the district court dismissed GP on the merits. As to Star, the district court found that Dangerfield showed by clear and convincing evidence that the defamatory material was false and that Star acted with at least reckless disregard of the truth when it published fabricated anecdotes. The district court found liability against Star.

As to damages, the district court stated that Dangerfield did not seek special damages and had therefore waived special damages. The district court found that Dangerfield failed to show that the article caused him extensive emotional distress. The district court awarded Dangerfield damages for emotional distress in the nominal amount of one dollar. The district court found that Dangerfield failed to prove that the article caused extensive damage to his reputation, and awarded actual damages in the nominal amount of one dollar. The district court awarded $45,000 in presumed damages. The district court did not award punitive damages because it found that Dangerfield failed to submit evidence showing that the financial net worth of Star would allow the imposition of punitive damages.

Dangerfield filed a motion for a new trial pursuant to Fed. R. Civ. P. 59(a) and (e) and a motion for leave to amend the complaint. The district court denied the motion for a new trial stating that its ruling was not contrary to the weight of the evidence that was presented at trial and the relevant law at the time. The district court denied the motion for leave to amend the complaint on the basis that Dangerfield failed to show that appellees implicitly consented to litigate under the alter ego theory.

Appendix B

II. *Post-Judgment Motion to Amend the Complaint.*

Dangerfield argues that the district court erred by denying his post-judgment motion to amend his complaint under Federal Rule of Civil Procedure 15(b). He argues that the issue of alter ego was tried with implied consent of appellees and that he introduced, without objection, evidence of an alter ego relationship between Star and GP.

A district court's order denying a Rule 15(b) motion to conform the pleadings to the evidence is reviewed for an abuse of discretion. *Campbell v. Trustees of Leland Stanford Jr. Univ.*, 817 F.2d 499, 506 (9th Cir. 1987). Under Fed. R. Civ. P. 15(b), "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fed. R. Civ. P. 15(b). "To establish implied consent, the [plaintiff] must demonstrate that [the defendant] understood evidence had been introduced to prove [the new issue], and that [the new issue] had been directly addressed, not merely inferentially raised by incidental evidence." *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) (quoting *Lalonde v. Davis*, 879 F.2d 665, 667 (9th Cir. 1989)). Furthermore, "[w]here evidence alleged to have shown implied consent was also relevant to the other issues at trial, it cannot be used to imply consent to try the unpleaded issue." *Id.* (quoting *Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 547 (5th Cir. 1989), *cert. denied* 495 U.S. 929 (1990)) (internal quotations omitted).

The complaint does not allege alter ego theory. The jointly filed Pre-Trial Conference Order does not list alter ego as an issue of law or fact to be litigated at trial. Dangerfield primarily refers this Court to David Galpern's deposition. This deposition does not show that there was implied consent to litigate alter

ego. The evidence brought out in the deposition was also relevant to other issues in the trial. Pursuant to *In re Acequia*, GP and Star did not implicitly consent to litigating alter ego. Only on appeal does Dangerfield present his alter ego arguments. The district court did not abuse its discretion by denying Dangerfield's post-judgment motion to amend his complaint to allege liability on an alter ego theory.

III. *Federal Rule of Civil Procedure 52(c).*

Dangerfield contends that the district court erred in denying his motion for a new trial because the evidence established that GP is directly liable as playing a responsible part in the publication of the article; GP is liable under the doctrine of respondeat superior as the "de facto" employer; and GP is liable based on principles of agency. In reviewing a judgment entered pursuant to Rule 52(c) following a bench trial, this Court reviews the district court's findings of fact for clear error and its legal conclusions de novo. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994).

Since it was stipulated that Dangerfield is a public figure, he must prove by clear and convincing evidence that each defendant published the defamatory statement with actual malice, "i.e., with knowledge that it was false or with reckless disregard of whether it was false or not." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)) (internal quotations omitted). A plaintiff must prove reckless disregard (or malice) with respect to each defendant, including the publisher. *See Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974).

Dangerfield seems to argue that simply because GP published the article, it is necessarily liable. But under *Cantrell*,

publication alone is not enough; rather, Dangerfield must also prove that GP acted with malice. We have reviewed the record and agree that there is no evidence that GP acted with malice. The editorial responsibility was strictly with Star. There is no evidence that GP had any involvement at all in the investigation of, writing of, fact checking or other editing of the article. At most the evidence shows that GP supervised the non-editorial aspects of publishing and distributing Star Magazine.

To the extent that Dangerfield is attempting to impute Star Magazine's malice to GP, either under a respondeat superior or agency theory, those arguments also lack merit and seem largely premised on an alter-ego finding, which, as set forth above, was not tried to the district court.

IV. *Punitive Damages.*

Dangerfield argues that the district court erroneously interpreted California law when it did not impose punitive damages on appellee Star. The district court found that Dangerfield failed to submit evidence showing that the financial net worth of Star would allow the imposition of punitive damages because punitive damages ordinarily rest on the defendant's net worth.

Dangerfield's argument that the district court erroneously used the "net worth" standard instead of the financial condition of Star is meritless. *See Kenly v. Ukegawa*, 19 Cal. Rptr.2d 771, 777 (Cal.App. 1993) (discussing that a "net worth" approach to assessing the financial condition is appropriate). "Three factors are to be evaluated in assessing punitive damages: (1) the reprehensibility of a defendant's conduct; (2) proportionality: whether the amount of the award bears a reasonable relationship

to the damage actually suffered by plaintiff; and (3) whether the award is reasonable in light of defendant's financial condition." *Kenly,* 19 Cal. Rptr.2d at 775 n.5. The only issue presented in this case is whether the district court properly considered Star's financial condition.

Dangerfield has the burden of proof to establish Star's financial condition. *See Adams v. Murakami*, 284 Cal. Rptr. 318, 327 (Cal. 1991) (placing burden of introducing the evidence of financial condition on plaintiff).

Dangerfield presented the following evidence of Star's financial conditions:[3] (1) testimony from a deposition of Star's Chief Financial Officer, David H. Galpern; (2) Star's Financial Statement; (3) GP's Prospectus; (4) circulation audit report of Star Magazine; (5) list of officers and directors of GP and its subsidiaries; (6) GP's SEC 10-k form; and (7) GP/AMOI's financial statements. Star's Statement of Operations for the fiscal year ending March 28, 1994 reflected a net loss. GP/AMOI has no balance sheets that isolate Star. The evidence demonstrates Star's net worth is at a net loss.

Dangerfield contends that the evidence related to GP's financial condition is relevant to Star's financial condition. As to the propriety of including the parent company's financial condition, in *Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr.2d

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3. Appellees stated in their brief that Star would have introduced evidence of its insurance to compensate any persons foreseeably damaged by its publications had alter ego been litigated. Dangerfield contends that had the district court been aware of the insurance policy, it would have awarded punitive damages. Because this information is not in the record, we do not consider it.

433 (Cal. App. 1994), *reh'g denied, review denied*, the plaintiff failed to present evidence of the financial condition of a subsidiary company, the defendant. *Id.* at 441. The only evidence the plaintiff presented was the parent company's annual consolidated report. *Id.* The *Tomaselli* court found that this evidence was not sufficient to support an award of punitive damages against the subsidiary. *Id.* The *Tomaselli* court also rejected the argument that the award supported the theory that the subsidiary and the parent companies were alter egos. *Id.* at 442. It reasoned that the issue of alter ego was not litigated or decided at trial. *Id.*

Similar to *Tomaselli*, alter ego was not litigated or decided at trial. Including GP's financial condition in the determination of punitive damages for Star is not appropriate. Dangerfield's introduction of GP's net worth, without isolating Star's balance, cannot sustain punitive damages without litigating alter ego. *See id.* at 441. Furthermore, the district court dismissed GP from the action on the merits. Given that the evidence presented showed that Star operated at a net loss, Dangerfield failed to establish Star's ability to pay punitive damages. The district court did not err when it declined to award punitive damages against Star.

V. *Motion for New Trial.*

Dangerfield contends that the district court erred in denying his motion for new trial. We review a district court's decision concerning a motion for a new trial for an abuse of discretion. *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995). Since the district court did not err in its judgment and refusal to impose punitive damages, the district court did

not abuse its discretion in denying Dangerfield's motion for new trial.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED MARCH 7, 1995

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STAR EDITORIAL, INC. AND AMERICAN MEDIA OPERATIONS, INC. (formerly known ap GP GROUP, INC.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 91 2123 RSWL (Bx)

RODNEY DANGERFIELD, an individual,

Plaintiff,

vs.

STAR EDITORIAL, INC., a corporation; GP GROUP, INC., a corporation; THE NATIONAL ENQUIRER, INC., a corporation; CARMINE RISO, an individual; DAVID LA FONTAINE, an individual; BARRY LEVINE, an individual; DISTRIBUTION SERVICES, INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

Appendix C

[PROPOSED] ORDER DENYING MOTIOIN FOR NEW TRIAL, AND DENYING MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

1. The motion for leave to file a third amended complaint is DENIED on the ground that the issue of alter ego was not tried by express or implied consent of the parties, and plaintiff has not established that this case is one in which it is appropriate to permit a post-judgment amendment of the complaint. *See, In re Acequia Inc.*, 34 F.3d 800, 814 (9th Cir. 1994). "To establish implied consent, plaintiff must demonstrate that the defendant understood evidence had been introduced to prove the new issue, and that the new issue had been directly addressed, not merely inferentially raised by incidental evidence." *LaLonde v. Davis,* 879 F.2d 665, 667 (9th Cir. 1989).

2. Plaintiff's motion for new trial is DENIED. The court finds that its ruling granting defendant GP Group's Rule 52(c) motion was in accordance with both the weight of the evidence and with applicable law. The court further finds that the court's award of nominal damages for emotional distress and for general injury to reputation was in accordance with both the weight of the evidence and with applicable law. The court finds that, under all of the relevant criteria, this is not an appropriate case for an award of punitive damages. Plaintiff had a full and fair opportunity to litigate the issues.

DATED: March 7, 1995

s/ RONALD S. W. LEW
RONALD S. W. LEW, UNITED STATES DISTRICT COURT JUDGE

Appendix C

SUBMITTED BY:

s/ VINCENT COX
VINCENT COX,
of LEOPOLD, PETRICH & SMITH
Attorneys for Defendants
STAR EDITORIAL, INC. AND AMERICAN
MEDIA OPERATIONS, INC. (formerly
known as GP GROUP, INC.)

APPENDIX D — TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 27, 1995

[Commencing at Page 4]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. CV 91-2123-RSWL

RODNEY DANGERFIELD,

Plaintiff,

VS.

STAR EDITORIAL, et al.,

Defendants.

BEFORE: HONORABLE RONALD S. W. LEW, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, FEBRUARY 27, 1995

ROGER D. MAY, CSR 7998
432 U.S. Court House
312 N. Spring Street
Los Angeles, CA 90012

Appendix D

[2] APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

LANGBERG, LESLIE & GABRIEL
BY: DEBORAH DROOZ, ESQ.
MICHAEL BARANOR, ESQ.

FOR THE DEFENDANT:

LEOPOLD, PETRICH & SMITH
BY: VINCENT COX, ESQ.

[3] INDEX TO PROCEEDINGS:

HEARING:

DEFENDANT'S MOTION FOR CORRECTING CLERICAL MISTAKE IN THE JUDGMENT, OR IN THE ALTERNATIVE TO AMEND THE JUDGMENT;

PLAINTIFF'S MOTION FOR NEW TRIAL;

PLAINTIFF'S MOTION TO AMEND THE SECOND AMENDED COMPLAINT

Appendix D

[4] MONDAY, FEBRUARY 27 1995; LOS ANGELES, CALIFORNIA

— 9:00 A.M. —

THE CLERK: Item No. 6, Civil 92-2123-RSWL, Rodney Dangerfield versus Star Editorial, Inc., et al.

Counsel, please make your appearances for the record.

MR. COX: Good morning, Your Honor. Vincent Cox for the defendant.

MS. DROOZ: Good morning, Your Honor. Deborah Drooz and Michael Baranor for the plaintiff.

THE COURT: There are three matters before the court. The first is defendant's motion for correcting a clerical mistake in the judgment, or in the alternative to alter or amend the judgment. Second, two motions, plaintiff's motion for new trial and plaintiff's motion to amend the second amended complaint.

I read the papers submitted to the court on each of the motions. Any further argument?

MR. COX: No, your Honor.

MS. DROOZ: I'd like to say a few words, Your Honor.

THE COURT: Yes.

MS. DROOZ: Your Honor, minutes after this court issued its ruling on January 18th, defendant's counsel advised the

media that their clients were "not in the business of publishing false information." What incentive do defendants have to make good on their promise to do better in the future if this court's ruling gives them a license to do exactly that, to [5] engage in the business of publishing false information?

The message that this court's ruling sends to the Star and to scandal mongers all across the country is that they can insulate themselves from punitive damages simply by creating assetless corporations to house their editorial arm.

We recognize that the court was faced with a dilemma at the time of trial. There was not much evidence before this court that GP Group acted with the requisite degree of malice. But this is only an apparent dilemma, Your Honor, and it evaporates once you take into consideration the evidence of alter ego that was before the court.

Plaintiff's moving papers contain a great deal of evidence of alter ego that was before the court at the time of trial, most of which was gleaned from the David Galpern deposition. I won't recount all of that evidence; that's set forth in plaintiff's papers. But the most important thing is that GP Group and Star Editorial engaged in the single enterprise of publishing Star Magazine; and GP Group is the direct recipient of all advertising revenues and all sales revenue generated by Star Magazine.

I submit, Your Honor, that alter ego evidence was before the court at the time of trial, and even though the magic words "alter ego" were not spoken, the fact remains that since the inception of this litigation, GP Group has asserted its separate corporate existence as the base for denying liability in this case. And under Auer versus Frank, Pan Pacific Sash and Door and

Gordon versus Aztec Brewing Company, that denial of liability raises the issue of alter ego as surely as any [6] pleading reference would have done.

We are not asking the court to bring in a third party that wasn't a part of this litigation. We are just asking for an opportunity to show that someone who was in control of this litigation from the outset was an alter ego of the defendant against whom liability was found. Since defendant would be able to present additional evidence if a new trial were granted, their claims of prejudice are really not meritorious.

Thank you, Your Honor.

THE COURT: Anything more?

MR. COX: No, your Honor.

THE COURT: I'm going to rely on the papers. Defendant surely has presented their case, and you have as well, and the plaintiff had the greatest opportunities to present sufficient evidence for which I could have more easily made a decision that you now argue.

However, I will rely on the status of the evidence that was presented at trial, and I truly believe that your request for a new trial at this time is inappropriate and it would be denied. The earlier court's ruling was not contrary to the weight of the evidence that was presented at trial and the relevant law at the time. The opportunity existed at that time, and I think you did not utilize it.

Appendix D

Your argument with regard to the alter ego in support of your motion for a new trial is based upon your request to further amend the second amended complaint to allege that alter ego theory. I will deny your motion as well, under In Re: Acequia, Inc. 34 F.3rd 800, 1994 decision, Ninth [7] Circuit.

Plaintiff have failed to show that defendant's implicitly consented to litigate under the alter ego theory and I will rely on that for the moment.

As for the defendant's request to correct the judgment, the judgment is actually correct, but the proposed amendment is only spelling it out to be clear, so I will grant that motion.

That is the court's ruling. You prepare the order.

MR. COX: I will, Your Honor.

MS. DROOZ: Thank you, Your Honor.

MR. COX: Thank you, Your Honor.

THE COURT: Thank you.

* * *

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA DATED JANUARY 18, 1995

[Commencing at page 4]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-2123-RSWL

RODNEY DANGERFIELD,

Plaintiff,

VS.

STAR EDITORIAL, et al.,

Defendants.

BEFORE: HONORABLE RONALD S. W. LEW, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

JANUARY 18, 1995

ROGER D. MAY, CSR 7998
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Appendix E

[2] APPEARANCES

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[3] Court's Ruling.

[4] JANUARY 18, 1995; LOS ANGELES, CALIFORNIA

— 2:00 P.M. —

THE CLERK: Item No. 2, Civil 91-2123-RSWL, Rodney Dangerfield versus Star Editorial, Inc., et al.

Counsel, please make your appearances for the record.

MR. LANGBERG: Barry Langberg and Deborah Drooz for the plaintiff.

MR. COX: Vincent Cox and Gary Grossenbacher for the defense.

Appendix E

THE COURT: Thanks you for your patience. I knew that you would be here, although I could not come out exactly at two o'clock, and before I give you the ruling, I will say that a thank you to the attorneys for making this trial as easy as it was. But then again, I sure wish I'd seen the witnesses, because it would have been a lot easier for me to have seen the witnesses testify than to have laboriously gone through all the depositions that were 29 in number.

But in any event, I've had the opportunity to go through the evidence and to have reviewed the notes and the arguments of counsel, and I make the following ruling:

The earlier request for a 41(b) ruling was submitted to this court at the close of Plaintiffs' case, but this 41(b) motion is incorrect. It is actually a Rule 52(c) motion, that is, a motion for judgment on partial findings, which this court now denies as to the Star, but grants as to the defendant GP Group.

The court finds that the plaintiff has failed to [5] show that the GP Group, now known as the American Media Operations, Inc., was sufficiently involved in the publication of the article.

The general rule is that the entity must take a responsible part in the publication of defamatory material for liability. I cite Osmond v. EWAP, Inc. 153 Cal. App. 3d 842.

The case law has held that distributors and other entities which do not know and have no reason to know of the libelous material are not libel for defamation. There is no evidence that GP Group took a responsible part in causing the article to be published. Thus, liability cannot be attached to GP Group.

Appendix E

As a threshold matter, the court finds that California Civil Code Section 48(a) does not apply to defendant Star because the defendant does not publish current news and cannot be considered a newspaper under the statute.

I cite to you Burnett v. National Enquirer, 144 Cal. App. 3d 991. Plaintiff thus is not limited to recovering only special damages.

As to liability for libel, the court finds that the September 11, 1990 article published by defendant contains defamatory material which an average reader would find exposed plaintiff to "hatred, contempt, ridicule, and obloquy" The court finds further that the defamatory material constitutes libel per se because the defamatory material concerns illegal behavior.

Plaintiff has conceded that he is a public figure. Thus, under the New York Times standard, the plaintiff must show [6] by clear and convincing evidence that the defamatory statements were made with constitutional malice, that is, with knowledge of falsity or reckless disregard of the truth.

The court finds that the plaintiff has shown by clear and convincing evidence that the defamatory material in question was false. Further, it is clear that the substantial truth or "gist" doctrine does not apply to this case because that doctrine excuses only "minor inaccuracies" and allows for "literary license," but not actual falsity as here.

I cite Masson versus New York Magazine, Inc., 501 U.S. 496, and Readers Digest versus Superior Court, 37 Cal. 3d 244.

In this case, the substance of the libelous charge is the

specific acts reported, not the general allegation of Plaintiffs' uncontrolled behavior. Thus, the gist doctrine is inapplicable.

The court finds that the employee of defendant fabricated anecdotes which appeared in the article. The court thus finds by clear and convincing evidence that defendant acted with at least reckless disregard of the truth when it published fabricated anecdotes.

I cite McCoy versus Hearst Corp., 42 Cal. 3d 835.

As an aside:

One. The court finds that the definition of malice contained in California Civil Code Section 48(a) applies only to newspapers protected under that statute.

I cite to you Manguso versus Oceanside Unified School District, 153 Cal. App. 3d 574.

[7] Two. The court also finds that the libel proof plaintiff doctrine does not exist in California law.

I cite the Masson versus New Yorker Magazine, Inc., 960 F2d. 896.

Third. This finding of liability does not rest on any reports of judicial proceedings in the Dangerfield versus Desert Palace litigation.

Therefore, this court finds liability against Star Editorial, Inc.

Appendix E

As to damages: Plaintiff fails to seek special damages, although there is evidence that plaintiff has been damaged in his occupation as an entertainer. Such evidence includes Plaintiff's loss of his California Rasin Advisory Board employment, the Rover Dangerfield movie and merchandising with the Licensing Corporation of America employment. However, this evidence may not be considered because plaintiff has waived special damages.

Plaintiff has failed to show that the Star article caused him extensive emotional distress. There is testimony that plaintiff never discussed the article with his psychotherapist, Dr. Ellis, even though plaintiff was undergoing therapy at the time the article was published and for sometime thereafter.

Furthermore, there is evidence that plaintiff himself subsequently could not remember the contents of the article. This evidence shows that the emotional impact on plaintiff, both at the time the article was published and thereafter, was not extensive. The court thus awards damages [8] for emotional distress in the nominal amount of one dollar.

Plaintiff further failed to prove that the Star article caused extensive damage to his reputation. The evidence shows that plaintiff's reputation was injured through his own impetuous and uncontrolled behavior and through other sources. There is no evidence that the Star article is the source of extensive damage to plaintiff's reputation. The court thus awards actual damages in the nominal amount of one dollar.

Pursuant to Weller versus American Broadcasting Company, 232 Cal. App. 3d. 991, at 1015, this court may award presumed damages for defamation in addition to actual damages. Presumed

damages are awarded in defamation cases because the effects of defamation are often injurious yet unprovable. The Star has a circulation of over two million copies per week. However, the record shows that plaintiff is considered less wholesome than the Cal RAB dancing resin. The court therefore only awards $45,000 in presumed damages.

Although the Star consciously disregarded plaintiff's rights in publishing the fabricated article, and did so with an improper motive, the court lacks a basis on which to award punitive damages. The publication of the article exhibits common law malice for which exemplary damages may be awarded. However, plaintiff has failed to submit evidence showing that the financial net worth of the Star would allow the imposition of punitive damages. Punitive damages ordinarily rest on defendant's net worth.

I cite Kenly versus Ukegawa, 16 Cal. App. 4th 49.

Plaintiff has introduced clear evidence showing [9] that the Star and its parent, GP Group, are structured so that the Star owns almost no assets. Unfortunately, the record does not contain evidence which would allow this court to penetrate this protective corporate structure. Much to its regret, this court is therefore legally precluded from imposing punitive damages against the Star, despite the Star's reprehensible, conduct.

Therefore, this court awards a total damage in the amount of $45,002, plus costs to the plaintiff. That is this court's ruling.

With regard to the proposed findings of fact and conclusions of law submitted to the court by the plaintiff, I will sign it as modified. This court will sign the judgment and file it today.

That is the court's ruling. Is there anything else in this case?

MR. LANGBERG: No, your Honor.

MR. COX: No, your Honor.

THE COURT: That's the court's order.

THE CLERK: Court now stands in recess.

* * *

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED JANUARY 18, 1995

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. CV-91-2123-RSWL (Bx)

RODNEY DANGERFIELD,

Plaintiff,

v.

STAR EDITORIAL, INC., et al.,

Defendants.

JUDGMENT

Following trial of this case before the Court an pursuant to this Court's Order and Findings of Fact and Conclusions of Law, Judgment for Plaintiff is hereby **ORDERED** as follows:

1. That Plaintiff recover the nominal sum of one dollar in damages for emotional distress,

2. That Plaintiff recover actual damages for injury to reputation in the nominal amount of one dollar,

3. That Plaintiff recover presumed damages for defamation in the amount of $45,000,

4. That Plaintiff recover nothing in punitive damages, giving a total recovery in the amount of $45,002, and

5. That Plaintiff recover costs as provided by law.

IT IS SO ORDERED.

Dated: January 18, 1995

s/ RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

No. CV-91-2123-RSWL(JRx), *Dangerfield v. Star Magazine, et al.*, Judgment for Plaintiff.

APPENDIX G — AMENDMENT TO JUDGMENT OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA FILED FEBRUARY 1995

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 91 2123 RSWL (Bx)

RODNEY DANGERFIELD, an individual,

Plaintiff,

vs.

STAR EDITORIAL, INC., a corporation; GP GROUP, INC., a corporation; THE NATIONAL ENQUIRER, INC., a corporation; CARMINE RISO, an individual; DAVID LA FONTAINE, an individual; BARRY LEVINE, an individual; DISTRIBUTION SERVICES, INC., a corporation; and DOES 1 through 100, inclusive,

Defendants.

Appendix G

AMENDMENT TO JUDGMENT

Following hearing of the Rule 60(a) motion brought by the defendants, the Judgment in this action entered January 19, 1995, is hereby AMENDED as follows, by inserting a paragraph numbered 6 at page 2, line 4 of the Judgment stating:

> "6. As to American Media Operations, Inc., formerly known as GP Group, Inc., the Plaintiff shall take nothing, and the action as to that Defendant shall be dismissed on the merits."

IT IS SO ORDERED.

DATED: February__, 1995

RONALD S.W. LEW, UNITED STATES DISTRICT COURT JUDGE

SUBMITTED BY:

s/ VINCENT COX
VINCENT COX,
of LEOPOLD, PETRICH & SMITH
Attorneys for Defendants,
STAR EDITORIAL, INC. and
AMERICAN MEDIA OPERATIONS,
INC. (formerly known as GP Group, Inc.)

Appendix G

APPROVED AS TO FORM ONLY:

s/ DEBORAH DROOZ
DEBORAH DROOZ,
of LANGBERG, LESLIE & GABRIEL
Attorneys for Plaintiff,
Rodney Dangerfield

APPENDIX H — TRANSCRIPT OF PROCEEDINGS DATED JANUARY 17, 1995

[Commencing at page 4]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 91-2123-RSWL

RODNEY DANGERFIELD,

Plaintiff,

VS .

STAR EDITORIAL, ET AL.,

Defendants.

BEFORE: HONORABLE RONALD S. W. LEW, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

JANUARY 17, 1995

ROGER D. MAY, CSR 7998
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Los Angeles, CA 90012

Appendix H

[2] APPEARANCES

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[3] INDEX TO TRANSCRIPT;

CLOSING BY MR. LANGBERG

CLOSING BY MR. COX

[4] JANUARY 17, 1995; LOS ANGELES, CALIFORNIA

— 9:00 a.m. —

THE CLERK: Item No. 2, Civil 91-2123, Rodney Dangerfield versus Star Editorial, et al.

Appendix H

Counsel, please make your appearances for the record.

MR. LANGBERG: Good morning, Your Honor. Barry Langberg and Deborah Drooz for the plaintiff.

MR. COX: Good morning, Your Honor. Vincent Cox and Gary Grossenbacher for the defendants.

THE COURT: The matter is set here at this time for arguments. Are you ready to proceed with your argument at this time?

MR. LANGBERG: Thank you, Your Honor.

THE COURT: I said are you ready?

MR. LANGBERG: Yes, sir, I am.

THE COURT: As an indicator, how long is your first opening argument?

MR. LANGBERG: I would think about 30 to 40 minutes, Your Honor.

THE COURT: Your opposition?

MR. COX: About the same, Your Honor.

THE COURT: All right. Proceed with argument.

MR. LANGBERG: Your Honor, both Mr. La Fontaine, the reporter for the Star, and Mr. Levine, the bureau chief who wrote the article, testified that their assignment was to find

material beyond what had been reported about Mr. Dangerfield and his dispute with Caesar's Palace. As Mr. La Fontaine said [5] and Mr. Levine said, to go beyond what was in the newspapers. And that's just what they did. They published an article that contained four stories, and those four stories added a brand new theme to anything that had been said about Mr. Dangerfield. It added the theme of violence. Mr. Dangerfield had suddenly smashed the shower, the marble shower in the hotel; he had suddenly chased a female employee around the room with ice tongs, threatening to rip off her clothes; he had suddenly become involved in a physical altercation with a customer in the casino.

Apparently Mr. La Fontaine, or Mr. Levine, or both of them, decided that that was the way they could go beyond what had already been printed in the newspapers. Add the theme of violence. Add the theme of violence and lewd and lascivious conduct, and do it by fabricating eyewitness testimony — giving it exceptional credibility by putting it in quotations, as if each incident was being told by the eyewitness to the incident.

Your Honor, let me first, before I go further on the issues of malice and some of the defenses, dispose of a couple of points, discrete points, concerning, first of all, Section 48(a) of the California Civil Code.

Defendants claim that as a newspaper it was entitled to a retraction under 48(a) — a demand for retraction and none was received. We fully briefed the 48(a) issue, and I certainly don't intend to repeat anything in our papers. I only call the court's attention to three things:

Appendix H

First of all, that the testimony of Mr. La Fontaine [6] made it clear under the law, Burnett versus the National Enquirer, that they are not a newspaper. There's no wire service in the office. He went through the entire transaction of how a story is developed and the time that they have for it, the lead-time. They're not dealing with hot news. They have no interest in sports or politics and, as Mr. LaFontaine said, they only have an interest in these subjects if they're different from what a daily newspaper would print. And I think that in and of itself establishes the issue.

Further, Your Honor, the deposition of Mr. Galpern, the financial officer, saw admitted into evidence the document from the audit bureau circulation, which classifies them as a magazine. And Your Honor, finally, I call the court's attention to the publication in question, the edition of the Star in question, first of all, on Page 17, where it says: "Car Contest Rules: The magazine excepts from the contest employees of Star Magazine."

Again, Your Honor, in the same edition, on Page 46, in another contest, it says: "Win $100 Instantly. Play Star Entertainment Trivia By Phone." Again the ad excepts from participation employees of Star Magazine or their families. And the word "Star Magazine" — Star is referred to as a magazine three separate times in that particular advertisement.

I refer the court again to our brief on this issue. I believe that there's no question that 48(a) of the civil code does not apply to the Star. They are not a newspaper.

The second issue, Your Honor, is the issue concerning GP Group — both the liability and net worth of GP [7] Group. As the court knows, we took Mr. Galpern's deposition the other

day and it was marked and submitted to the court. That deposition showed two things, both with respect to the liability of GP Group, which is a named defendant in this case, and its net worth.

First of all as to liability, Mr. Galpern makes clear that Star Editorial, Inc. is a subsidiary of GP Group — and I'm using GP Group, Your Honor, because it's what — it's the named defendant. Their name has since been changed once and then again, and they're now American Media Operations, Inc. And American Media Operations, Inc. formerly known as GP Group, is the parent of Star Editorial, Inc., the other defendant in this case.

Mr. Galpern testified unequivocally that Star Editorial, Inc. exists primarily for tax purposes, that there is no profit to the company, that it receives only enough funds from the parent to pay its expenses. All revenues from the sale of Star go to GP Group, now known as American Media Operations, Inc. — all circulation revenues and all advertising revenues.

Further, GP Group, American Media Operations, Inc. is active, from a libel standpoint, the publication of the defamation. They caused the paper to be printed; they caused the paper to be distributed across the country: 2.8 million copies a week.

So in effect, Star Editorial, Inc. is a shell that receives money from GP Group just to maintain its expenses with no intention of making any profit or accumulating any cash flow. Mr. Galpern pointed out that Star Editorial, Inc. has hardly any [8] assets.

Also, the new editions of the Star, as Mr. Galpern identified

one, say, "Star, a division of American Media Operations, Inc." And Mr. Galpern pointed out that the Star division also carries on the operation of publication of the Star Magazine. It is not a separate corporation, as is Star Editorial, Inc.

Briefly, Your Honor, as to the net worth issue — and I submit to the court that it's clear that the net worth —

THE COURT: Do you have any — you didn't submit any points and authorities in that regard. Of course it came up late perhaps. But are there any points and authorities that you intend to submit with regard to that argument that you just made as to GP's liability?

MR. LANGBERG: Your Honor, I don't have any with me, but within —

THE COURT: Well, you should have known that because of the motion that was made and that's still pending with this court.

MR. LANGBERG: Your Honor, GP Group is a — I'm not asking the court to find that there's some parent subsidiary liability — in other words, vicarious liability. GP Group is a named defendant in the complaint, and we allege publication on their part, and we believe that Mr. Galpern's deposition clearly shows that there is active firsthand publication, participation in the publication of the defamation by GP Group, and the reaping of the profits by GP Group. So that it is not a vicarious liability issue, Your Honor, but a primary liability [9] issue. GP Group causes this paper to be published. The only thing Star Editorial, Inc. has is the writers and editors.

THE COURT: I understand the facts. You don't realize how much time I spent with the facts.

MR. LANGBERG: Your Honor, I know what you read.

THE COURT: So I'm aware of what the facts are. If you want to rest on what you're submitting, I'll accept that.

MR. LANGBERG: Your Honor, I would like to —

THE COURT: I'm not inviting it. You should have already submitted it. But if you have no authority in that regard, I'll just rely on what I have.

Go ahead and continue.

MR. LANGBERG: The net worth with respect to American Media Operations, Inc. is, as Mr. — it's a little difficult to spell out. But basically as Mr. Galpern testified, up until a month or so as it was approximately $327 million. Then a restructuring, a financial restructuring, was done, including a $292 million stock dividend paid. And Your Honor, I believe the only California case on point indicates that stock dividends should not be considered as — recent stock dividends should not reduce net worth. But even if we do reduce net worth by the stock dividends, the current financial statement as of December, after the $292 million stock dividend, shows a net worth of $36 million dollars, plus a $24.7 million deferred income liability, which Mr. Galpern explained is not a true liability. It is revenues received for subscriptions and advance advertising, which ultimately go into income and profit and should not be used to reduce the net worth column. So even [10] after their dividend, we have $36 million plus $24 million, so we have a true $60 million net worth in this company.

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Your Honor, I'd like to address the issue now of the defamation, and initially touch on the issue of constitutional malice.

I think that there is clear evidence here of constitutional malice. First of all, we have double fabrication. We have testimony — and I'll touch on the specifics of it momentarily — but we have testimony from each of the confidential sources that were deposed, that is, three of the four, said they did not say what Mr. LaFontaine said they said. That's one level of fabrication.

Then we have a second level of fabrication. And that is between Mr. LaFontaine and Mr. Levine. Mr. LaFontaine made it clear on the witness stand that considerable material, considerable defamatory material, in this article, which I will enumerate, was not provided by him and he has no idea where it came from. It's clear that Mr. Levine fabricated additional material before he sent this story on to New York.

Beyond that — and I think that the St. Amant case makes it clear that intentional fabrication is sufficient to create constitutional malice. But beyond that, Your Honor, we have destruction of notes, which is considered an element of constitutional malice. We have a preconceived story line. We have the attempt to make it seem that there were eye witnesses when there were none. All of these things — unnecessary, really, because we have intentional fabrication — simply add to the manner in which this case — in which this article was [11] presented to the public. It was simply a preconceived idea to go beyond what the newspapers were publishing at the time, and they did it. And they did it by adding eyewitness testimony to rather violent incidents that never happened.

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The testimony of source number two is very interesting as indicative of the kind of and the manner that this article was written. Source number two, Your Honor will recall, is the receptionist at the spa. And the receptionist at the spa, according to Mr. LaFontaine, he approached her, he asked her for information about Mr. Dangerfield and she referred him to source number three. That's Mr. LaFontaine's testimony.

Now, source number two, under oath, said that she provided no information to anyone about Mr. Dangerfield, and that she was never approached by anyone to provide information about Mr. Dangerfield. And not only that, Your Honor, but she says that she's been working at the spa for 15 years and she never heard of anyone by the name of source number three. And that, of course, coincides with our investigation being unable to turn up this so-called source number three.

We submit to the court that the evidence is very strong that there was no source number three, that source number two said nothing, and that Mr. LaFontaine, in effect, got names from some nameplates or whatever source he got them in the casino, or in the hotel, and decided that those were going to be his sources. There's absolutely no justification, no evidence, that Mr. LaFontaine ever talked to either of these people.

Source number four, Mr. LaFontaine tells us, provided the information about the altercation with the casino [12] patron being thrown against the wall and so forth. Source number four's deposition, he said that he never said anything to Mr. LaFontaine. He said that he had never ever seen Rodney Dangerfield, ever, and that he had no idea about anything of this incident.

Now, Mr. LaFontaine had a business card from this source. And I don't believe, Your Honor, that that is very compelling evidence that he obtained the information or even spoke to this source. There are many ways to get a business card. He also paid a check to another source, which I'll get into in a moment, who also denied saying the things that Mr. LaFontaine said he said.

It seems, Your Honor, a very convenient way to develop sources: get names, maybe even a business card, talk to someone about anything, send them a check even, and now you've got sources.

Your Honor, when you made the order to disclose the confidential sources in this case, one of the comments that you made is, and I'm paraphrasing just slightly: What if these sources say they never said anything?

Your Honor, every one of them said they never said any of this. All three that we interviewed. Either all three of them are lying or Mr. LaFontaine is not telling us the truth. I submit the latter is the case.

Source number one did speak to Mr. LaFontaine. He's the room service person that came to Mr. LaFontaine's room. He spoke to him before he knew that he was a reporter, and then later learned that he was a reporter. LaFontaine told him.

[13] Source number one, first of all, said anything I told him I told him was all hearsay.

Secondly, what I did tell him was that I heard that Rodney liked to party, that he liked having a good time, that something happened in his dressing room and some shows were cancelled,

that someone smelled marijuana in his room. That is all source number one says he told Mr. LaFontaine. That is a far cry from what was written in this article.

Interestingly, Your Honor, source number three was never found. Exhibit 236, which is, if you'll recall, the draft article that was prepared by Mr. Levine, but keyed to the names of the sources for the material — Exhibit 236 indicates that source number three was the source of the story where Mr. Dangerfield, when asked for an autograph, with some profanity disposed of the autograph seeker.

Now, in 236, source number three is attributed to that. But in Mr. Levine's deposition, in his testimony at Page 90, Mr. Levine testifies that Mr. Delpit was the source for that. So again, you have no consistency between what Mr. LaFontaine says are his sources and what his sources say.

The second level of fabrication was Mr. Levine. Mr. Levine fabricated he was blotto. He fabricated the naked girls, the smashed shower, up to the ankles in water, the dumbfounded look, chased an employee around the room with ice tongs, threatened to rip off her clothes. All of that was fabricated by Mr. Levine, because even Mr. LaFontaine said I never told him that and I have no idea where he got it. But in his deposition, Mr. Levine said that the statements in the [14] article appeared just as he took them down from Mr. LaFontaine, virtually verbatim. That's a total lie.

Your Honor, I believe that we have clearly shown the statements in question are libelous per se, that is, libelous on their face — doesn't seem to be any issue over that. And that there was constitutional malice. And Your Honor, the law in

California is that if an item is defamatory per se, and constitutional malice is proved, then damages are conclusively presumed. Not rebuttively presumed but conclusively presumed.

I suggest that we have a conclusive presumption in this case of damages, based on libel per se and constitutional malice both being clear.

Further, Your Honor, in terms of the harm here, it is clear that the specific — the specificity of these particular charges creates a certain impact in the article. They're in quotes; they're specific eye witness events. And as Professor Smolla says in his work on defamation, which has been cited often, even by the U.S. Supreme Court, says that specific defamatory charges create greater injury because the detail tend to lend to credibility.

As a matter of fact, the specific defamatory charges in this case give validity to the Caesar's charges, that are not part of this lawsuit. Because the specific evidence that's apparently given to the reader plays a part in the reader's overall assessment of the article.

As the court knows from the publications that are in evidence, Caesar's made considerable charges in the lawsuit. [15] The brief that they filed is in evidence. The court can see from that brief that the charges they made didn't really have much to do with the substance of the case, and as one of the newspaper articles in evidence says, there was a successful motion to exclude that evidence. It seems tragic that that evidence can be reproduced by the Star and then have its credibility reaffirmed, extended beyond what it ever was, by adding specific eyewitness testimony and a new theme of violence.

THE COURT: What is curious at this point is that given what you say is true, if it's accepted to be true, why are special damages waived? It flows from the earlier lawsuit with Caesar's, and I don't understand. But in any event, know that there's a query with that.

MR. LANGBERG: Your Honor, let me address it immediately. And special damages were waived because they were impossible to prove. They were impossible to delineate. It was that simple.

We made an effort, Your Honor — we made an effort to develop the evidence and we were unsuccessful.

THE COURT: Let me see how you develop the argument for damages now.

MR. LANGBERG: Thank you.

Your Honor, just as a opening to that argument — and I've already made the point, but I just wanted to read one cite from a California case, Contento versus Mitchell, at 28 Cal. App. 3d 356:

> However, it is equally well settled that in an [16] action for damages based on language defamatory per se, damage to plaintiff's reputation is conclusively presumed and he need not introduce an evidence of actual damages.

The Supreme Court of the United States added another element to that, of course, and that is that in order to have

presumption of damage, constitutional malice must be shown, which it has been in this case.

Your Honor, first of all, emotional distress damage is a separate and distinct element of libel damages.

In Times, Inc. versus Firestone, United States Supreme Court case at 424 U.S. 448, the point was made that emotional distress damages can be had in a libel case even without any damage to reputation or any proof of damage to reputation, presumed or otherwise. And I believe, Your Honor, as a first element of damage, that Mr. Dangerfield's testimony, and the obvious effect of these articles, justifies an award of damages for emotional distress, as well as injury to reputation.

Mr. Dangerfield testified that he was upset by the article, that people asked him if it was true, that he was concerned about the article and its continuing life. And Your Honor, I point out that 2.8 million circulation of the Star is a substantial national circulation.

He pointed out that he was portrayed as a beast. And that although other articles, negative articles, had been printed about him, that this one hurt particularly. His quote was that "they laid it on unreasonably."

He also felt that the specifics made it more [17] believable, and he was concerned that while his victory in the Caesar's case would generally overcome the general allegations made by Caesar's, that this eyewitness testimony and lewd, lascivious and violent behavior would have a significant, lasting impact.

I don't think it's unreasonable, Your Honor, for a man to say that, faced with these stories, these fabricated stories, that he suffered humiliation and some mental anguish.

THE COURT: You know on that score: You objected to Dr. Ellis' deposition from coming in because of privilege and privacy. I don't know what the objection with regard to privacy is. But with regard to privilege, doesn't the claim that you are now arguing for damages obviate the asserted objection that you have?

MR. LANGBERG: Yes.

THE COURT: Okay. I just want to be clear with that, because you made it very strong in your papers objecting to it. In any event, I'll accept it.

Continue.

MR. LANGBERG: Let me talk about Dr. Ellis' deposition for just a second.

THE COURT: Yes, because that brings up another level of questions obviously.

MR. LANGBERG: Yes, it does, Your Honor.

THE COURT: I'm sorry. I shouldn't have stopped you.

MR. LANGBERG: No, I appreciate your stopping me, because I was finished with emotional distress, and this is an [18] important point to address.

THE COURT: I thought it justified it.

MR. LANGBERG: I appreciate it, so let me address it.

First of all, if a man who is suffering from whatever mental anguish Mr. Dangerfield suffers from, in general, and we can read Dr. Ellis' deposition and learn about Mr. Dangerfield — and by the way, I note that Dr. Ellis does not think he's addicted to substances and so on.

But at any rate, because a man suffers from whatever emotional anguish Dr. Ellis had portrayed as Mr. Dangerfield's problem, it seems to me it would be a rather strange world if that man, because he is disturbed to whatever extent he is, suddenly can't be — can't suffer emotional distress when he's intentionally defamed. One of the things that Dr. Ellis does not point out in his — you never see a problem with in his reports, is Mr. Dangerfield's ability to work. He has feelings about it, but the man is obviously successful.

To create stories which may, as our expert witness testified, have some effect on Mr. Dangerfield's ability to work, and Mr. Dangerfield testified I want to go back to stand-up comedy, that's my staple, what effect will this have. Certainly that is a significant element of emotional distress, regardless of what else he may be suffering from.

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Your Honor, there are two issues that I think — two defenses that I think are interrelated to the issue of damages, reputational damages — really three. One of them is [19] the same thing to say about both of them: a bad idea. I suggest to this court that just as Justice Kozinsky stated as to the instrumental harm aspect of it, that he couldn't improve, he says in language, we cannot improve upon, the Judge Scalila expresses the fundamental flaw and the incremental harm doctrine. He would not improve upon Judge Scalila's analysis of the other half of the libel proof plaintiff doctrine either.

It's not surprising, Your Honor, that the Ninth circuit has made this finding, because as early as 1967 in a case called Brandt Versus Superior Court at 67 Cal.2d. 437, the California Supreme Court made a very succinct statement:

> A man with a very bad reputation may be libeled, end quote.

Your Honor, let me suggest to the court that the testimony that has been presented, that which of it is admissible — I'll get to that in a moment — really has very little to do with the issue in this case. One of the things that I assume counsel is attempting with his proof, since there is no incremental harm or libel proof plaintiff doctrine in California, to mitigate damages by showing that Mr. Dangerfield already has a bad reputation.

Now, that overlaps these issues. But Your Honor, the Court of Appeals in California clearly stated in Clay Versus Lagiss, L-a-g-i-s-s, at 143 Cal. App. 2d 411:

> A general reputation consists of the estimation in which one is held in the

> community in which he resides. It can only properly and faithfully be testified to by a member of the community.

[20] Now, Your Honor, we don't have one shred of evidence as to Mr. Dangerfield's reputation in the community in which he resides. His deposition has been entered into evidence and he talks about his home in the East, in Connecticut, and his home here in Los Angeles. There is no evidence in this case that from anyone in the community in which Mr. Dangerfield resides about his reputation.

In the same case that I cited a moment ago, Clay Versus Lagiss, Your Honor, and this is a 1956 libel case in California, the court states:

> However, as we have already noted, plaintiff pleaded general, not special damages. And whereas here, the other instance, slander per se, damages are presumed and evidence tending to show lack of injury to the reputation is inadmissible.

I suggest, Your Honor, that the law in California — and we cited some cases, some other cases at length in the brief, which I'm not going to repeat, of course — that much of the evidence submitted by the defendants in order to show a so-called bad reputation is simply inadmissible. Also it doesn't really show what they wanted to show.

First of all, there is nothing that compares with the article that they wrote. And I think the flavor of that is easily seen when you look at the Supreme Court version of the Masson case. The court says there:

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> In general, quotation marks around a passage indicates to the reader that the passage reproduces the speaker's words verbatim. They inform the [21] reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work.

The court further held that:

> The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry (talking about constitutional malice) but it is not dispositive in every case.

Then the court goes on to say:

> And for the reasons we have given, quotations may be a devastating instrument for conveying false meaning.

Here, Your Honor, quotations were used as a devastating instrument to create false eyewitness testimony of lewd and lascivious and violent events.

It is clear, Your Honor, that regardless of the additional articles that may have been published about Mr. Dangerfield concerning the Caesar's dispute, none of them went to this level. And that's why when he was on the stand he said that it hurt. It hurt because they "heaped it on unreasonably."

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If a man can have some articles written about him, negative articles written about him, and that gives any other publication a license to fabricate any stories it wants, I believe, and I suggest, Your Honor, that we will have come to a very bad place in journalism. And I don't think that's the law. I know that is not the law. This is the case of outright [22] fabrication. It's a case of presumed and serious damages to reputation. 2.8 million copies of this publication were circulated across the United States.

Finally, Your Honor, I would address the issue of exemplary damages. Based on everything I've said, obviously I believe we have a strong argument for the award of punitive damages. 3294 of the California —

THE COURT: Are you going to attribute a number to your argument, or are you just leaving it like it is?

MR. LANGBERG: Your Honor, I'm leaving it like it is I thought long and hard about this and —

THE COURT: Well, let me not interrupt your flow of thought then.

MR. LANGBERG: Thank you.

Your Honor, I think that 3294 says: Malice means conduct which is intended by the defendant to cause injury to the plaintiff for despicable conduct which is carried out by the defendant with the willful and conscious disregard of the rights.

I can say nothing but that the evidence has shown that that is exactly what happened.

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Your Honor, if you read the 10-K that's in evidence, and the offerings or the prospectuses that's in evidence in this case, you'll find that they each have a section on legal matters. Basically what they say in those sections on legal matters is, if you read them I think the conclusion is very clear: that libel cases are treated as just another cost of doing business. They dont't have material impact on the [23] company's financial condition — just a cost of doing business.

Your Honor, if libel cases are allowed to be a cost of doing business, if the intentional publication of a defamatory falsehood, fabricated out of thin air, is just another cost of doing business, then the law of the State of California with respect to punitive damages is meaningless.

I suggest, Your Honor, that even if you take the $36 million net worth, after the dividends, and don't even add back in this income that's really listed as a liability, and they explain in their own 10-K, that it's really not a liability. But even if you stick with the $36 million net worth, this is a very wealthy company, generates huge amounts of cash. And I think that a punitive damage award of ten percent of that $36 million would be appropriate in a case like this, to say to these people that this is not the way to conduct yourselves in publishing a 2.8 million circulation magazine.

Thank you very much, Your Honor.

THE COURT: Defense.

MR. COX: Good morning, Your Honor.

At the outset, Your Honor, I'd like to thank you for your

patience and for your attention during the course of these proceedings. We have prepared written submissions of findings of fact and conclusions of law that I'm sure you've examined in some detail. I will try not to duplicate any of the material that is contained in those findings.

I'd like to preface this by saying that this case is not about whether or not Mr. Dangerfield worked hard during his life to get to the top of his profession. It's not about [24] whether or not he has talent. He clearly has talent. He clearly worked hard. This case is in large measure about the way that Mr. Dangerfield handled the pressure of being at the top.

At the outset, I would like to just briefly address our Rule 41(b) motion at the close of the plaintiff's case, and specifically address it as to GP Group, Inc.

The evidence that plaintiff introduced of the people that participated in the editorial process in creating this story showed that all of them were employees of Star Editorial, Incorporated. No employee or agent of GP Group, Inc., now known American Media Operations, Inc. in any way participated in the editorial process, in any way had the necessary degree of awareness that would be required in order for the imposition of liability under the New York Times Versus Sullivan standard.

Based on that fact, Your Honor, the Rule 41(b) motion should be granted as to GP Group, Inc.

The second point that we made in our Rule 41(b) motion, and I'd like to expand upon it a little bit here, and I think I'll be talking about evidence that came in on our side of the case, was that there is no credible evidence of any substantial reputational

injury or any compensable emotional harm resulting from the challenged portions of the article. The article was on the newsstand for one week. There's no evidence that it goes into a library or a data base or any computer source that you can find it once it's off the newsstand.

The plaintiff, as far as any kind of showing of [25] substantial truth defense that's been asserted, in so many words, and the other one is the libel proof plaintiff doctrine that's been asserted.

Your Honor, there are two aspects of this so-called libel proof plaintiff doctrine that have been developed under the law, the incremental harm aspect and specific facts aspect. The incremental harm aspect of the libel proof plaintiff doctrine has been absolutely, unequivocally, clearly, certainly stated by this Circuit to be not the law of California. It has been repudiated.

In the Masson case on remand from the Supreme Court, the Ninth Circuit said:

> Because it is not required by the First Amendment, because the Supreme Court has severely undermined the case authority that generated the doctrine in the first place, because the California courts have never adopted it, and because we believe the California Supreme Court would agree with Judge Scalia that it is a bad idea, we conclude that the incremental harm doctrine is not an element of California libel law.

The Ninth Circuit has never had an opportunity to deal

with the issue specific aspect of the libel proof claim. That was the incremental harm done. But Your Honor, I only point out that in the Liberty Lobby case, that at that time was Justice Scalila's opinion and the circuit, that he dealt both with the incremental harm doctrine and the issue specific aspect of the libel proof plaintiff theory, and he had [26] specific emotional injury, made it clear that, in his deposition, that he was not even aware of the contents of the article. He did not recall whether the article had a headline, did not recall whether or not it had a photograph, did not recall how long it was, did not recall where he was when he read it. He was unable to recollect what the gist of the article was. The annals of libel law have probably never encountered a plaintiff who is unable, when he is testifying at a deposition, who is unable to identify the article that is the subject of the lawsuit.

The evidence on damage to reputation showed that there was no evidence brought forward of any good reputation of this witness. There's a common law presumption of good reputation, but it is a presumption that goes to the burden of producing evidence. The defendants' introduced evidence not only of his poor reputation in Las Vegas, but also of his poor reputation in other parts of the country, including Los Angeles, as shown by the deposition of the custodian of records of Licensing Corp. of America, which we referred to as LCA.

Those records showed that during the week prior to the publication of the article, there was a virtual firestorm of adverse publicity concerning Mr. Dangerfield; that in fact, people were cancelling or expressing reluctance toward involvement in Rover Dangerfield licensing because Mr. Dangerfield, in their words, had a reputation as a bimbo-chasing Las Vegas type.

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There is absolutely no evidence that has been brought forward by any source, even their expert, claiming [27] that Mr. Dangerfield does have a reputation that's anything other than what we've portrayed it as, Your Honor. Under the circumstances, there's no substantial reputational injury.

As far as the emotional injury, Your Honor, the California law is that California does not compensate people for emotional injury that is transitory, that is, a part of the ordinary occurrences of life.

There is no evidence here that the portions of the article that they are alleging to be actionable actually caused the — any intent or lengthy emotional distress, that there were any symptoms of emotional distress. In fact, the testimony of Dr. Ellis showed that the publication of the article coincided with the end of Mr. Dangerfield's therapeutic relationship with Dr. Ellis, and that Mr. Dangerfield mentioned it little or not at all in his sessions with Dr. Ellis. This is not the kind of emotional experience that calls out for the court to compensate the plaintiff.

There is no evidence that this article or its contents was burned into his consciousness or created any dark nights with the soul. It didn't change his life. What it did was give him an opportunity to try to reverse the adverse consequences of the Caesar's Palace case. What it did was give him an opportunity to try to demonstrate that the allegations that Caesar's Palace had made were in fact false by bringing this lawsuit.

Now, that brings us really to the issue of truth and falsity as it pertains to this article. The cases that we've pointed out to Your Honor are quite clear that truth or [28] falsity does not turn on literal truth or literal falsity. It goes to the gist and sting

of the article, and it is not looked at under the microscope of legal analysis. It's not looked at as a lawyer would look at it. It's looked at as the ordinary reader of the Star would look at it.

The ordinary reader of the the Star would see the headline, would see the start of the article, would remember the end of the article. But the ordinary reader of the Star would not give this article the careful reading that the plaintiff understandably has given it.

Another point about the issue of truth and falsity, Your Honor, is that the United States Supreme Court has allocated the burden of proof in these matters to the plaintiff. It's the plaintiff's job to prove falsity. That reverses 300 years of libel jurisprudence in which it had been the defendant's job to prove truth.

And plaintiff here has attempted to prove falsity in the most minimalist way possible. Plaintiff's approach has been to take the stand and, in a series of leading questions and answers, deny that the statements contained in the article ever occurred. And then when confronted by evidence of conduct which is of the sort that's described in the article, in terms of partying in his room in, terms of drug use, in terms of erratic behavior, to simply say he doesn't recall, he has no recollection.

Your Honor has read the deposition of Jeffrey Schimmel, which exhibits statements concerning the consumption of marijuana and vodka by Mr. Dangerfield on the night of March [29] 16, 1988. And Mr. Dangerfield has had a long time to think about that, because that was the focus of the allegations in the Caesar's Palace litigation. And yet when asked about whether or not he had had any marijuana or any vodka that night, he simply said he couldn't recall.

Now, if he can't recall, if that's a truthful response, I would suggest to you that this is not the kind of recollection that is sufficient to carry the burden of proving falsity. Because that is the only way in which falsity has been attempted to be shown here.

Mr. Dangerfield testified that there were other people in the room. He testified that Mr. Schimmel was in the room, Mr. Schimmel's brother was in the room. That Bob Nelson was in the room and that his manager was in the room.

Now, Mr. Dangerfield has not called Mr. Nelson to testify to corroborate his version of what took place. He has not called the manager to testify as to what took place. And the two other people who Mr. Dangerfield acknowledges were in the room, Mr. Borg and Mr. Schimmel, have testified in detail to excessive consumption of alcohol and drugs.

The overwhelming weight of the evidence is that Mr. Dangerfield was in fact engaged in erratic behavior, partying. There's the matter of the phone record from Mr. Dangerfield's room that shows a phone call to a convicted panderer and drug dealer. We happened, through a series of fortunate or unfortunate occurrences, depending upon your view of the case, we happened to locate the individual whose job it was to answer the phone at that drug dealers house. She testified to a call [30] from Casey Casabeir. Casey Casabeir testified that she was in fact in his suite during that week at Caesar's Palace. She testified that she was a good friend of Mr. Dangerfield's, that she had been his guest at performances in Las Vegas on many occasions, that he called her whenever he was in Las Vegas.

Mr. Dangerfield's response to this testimony and to this

evidence is: "I don't recall. I'm a celebrity. I see many people. They are just faces to me. I don't remember the names."

Well, again, if Mr. Dangerfield is unable to recall, perhaps he doesn't have the kind of recollection that would support a finding of falsity here.

THE COURT: Mr. Cox, in this area where you're arguing truth as a defense, you're avoiding obviously the little truth presentation. But even a reader of the Star could look at a quote that permeates that article and would attribute Mr. Dangerfield's actions to be that specific action. What is your response to it rather than the general scenario that perhaps he does use marijuana and perhaps he does drink, perhaps he does party or maybe use cocaine? How about the quote?

MR. COX: Well, Your Honor, the portions of the Masson case that Mr. Langberg was quoting from about quotes being devastating instruments, those quotes were references to the fact that when a plaintiff is quoted it can be a devastating instrument.

I would submit, Your Honor, that there is a substantial difference between a quote of a third party witness being varied in some way than a quote of the plaintiff. In the [31] Masson case, the gist of Mr. Masson's libel claim was that he had been made to look vein and foolish.

Now, the gist of Mr. Dangerfield's claim is not that I am harmed because these people have been misquoted. The gist is I am harmed because people believed that these statements are true. And it is not — it really doesn't — the gist and sting of the injury that's alleged doesn't go to the accuracy or inaccuracy of the quote as it did in the Masson case. The gist or sting of the

injury that's alleged here goes to whether or not Mr. Dangerfield engaged in the kind of conduct that's alleged by those quotes. And Your Honor, I think that there is substantial evidence that he was engaged in conduct such as that.

If you read the portions of the Tammy Martin deposition, describing her encounter on the casino floor with Mr. Dangerfield, in the company of Ms. Casabeir, you'll see a man who is staggering around the casino floor with slurred speech, insulting casino patrons, who's engaging in conduct that is so rude and obnoxious that a call girl wouldn't want to have anything to do with him.

Another point that I wanted to make about this issue of truth and falsity, Your Honor, is that there is a difference in the way that the plaintiff and the defendants approach this issue. The plaintiff treats truth or falsity as an absolute: something is either true or it's false.

The defense treats truth or falsity — and I think that we're in line with California authority here — as a question of substantial truth. A question of comparing the [32] literal statements that's contained in the article with the actual thing that occurred. It's a comparative test. And that's contained in the Morningstar versus Superior court case that we cite in our proposed findings, Your Honor, which in fact relied upon the Masson case.

The idea is to compare not whether there was ever an instance in which there were naked women in the room while the water was ankle deep. If the water was just splashed around on the floor, that should be enough. It doesn't really matter. The depth of the water has nothing to do with what is alleged in this action.

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On the question of truth, Your Honor, plaintiff has really introduced little or no evidence to impeach the testimony of Mr. Borg, Mr. Schimmel, Mr. Pilkington, Ms. Beasley or Tammy Martin, or any of the other people that we have introduced in evidence, Your Honor.

There seems to be an attempt to simply side-step it and say we don't remember any such thing, and hope that that gets the job done. I don't think that that gets the job done given the way in which the law applies the burden of proof to the plaintiff to show falsity, and not just literal falsity, substantial falsity.

One part of this case, in which I agreed with Mr. Langberg in his presentation, was the part in which he asserted that there is no license to fabricate. There is no — journalists don't have a right to print things that they no know to be false. The fourth estate is not empowered with some kind of entitlement that enables it to run rough-shod over people. [33] We agree with that. We don't contend that we did in this instance.

We would like to point out though that there's another kind of spurious claim of entitlement that undermines or underlies the plaintiff's position in this case, and that's a sort of claim of celebrity entitlement. A right to be rude, to be vulgar, to ignore the laws that govern others and to then, when it's reported that you're rude and vulgar and that you have ignored the laws that govern others, to claim that their reputation has been harmed.

The reputational consequences that Mr. Dangerfield has felt as a result of his conduct in Las Vegas, in March of 1988 and prior to that, is basically what he deserves. Mr. Dangerfield, by living in the celebrity stratosphere, feels completely immune to the rules that bring other people, who don't live in that

stratosphere, to this court, standing not very far from where I'm standing, in prison garb, looking at spending some time under federal care. It's the most remote thing from Mr. Dangerfield's mind that there are laws that pertain to this — that he's providing the money that other people are going out and breaking laws to get, that he's providing the image that other people are trying to imitate. It's a position of responsibility as well as a position of privilege. And Mr. Dangerfield abused those responsibilities, failed to live up to them, and he has suffered the reputational consequences.

But the article that we published came at the tail-end of a hurricane of bad publicity. It was a leak blowing [34] in the wind. And there is no evidence from anybody that they actually read this article and it impacted their sense of who Mr. Dangerfield was, or it had any affect on any aspect of their interaction with Mr. Dangerfield. Nobody has come forward to testify to such a thing.

With respect to the actual malice part of the case, Your Honor, as we stated in our opening argument, this article was not a model of journalism. We didn't submit it for the Pulitzer with good reason. The defects of the article are exaggerated by the plaintiff. Plaintiff would have the court believe that not only did we take the statements that Mr. LaFontaine conveyed to Mr. Levine and include elements that had not been provided by Mr. LaFontaine, but that we were so Machiavellian as to fabricate the names of non-existent sources, and then so idiotic as to do it in a way in which we would readily be discovered. We can't be Machiavellian geniuses on the one hand and so foolish as to do it in a way that would be so readily discovered on the other.

What happened here is that these sources, who two of whom

were promised confidentiality, were subject to a court order; those promises were broken. When you do that, a few things happen. One of the things that happens is that the source is given a subpoena from the plaintiff, and is given some concern as to his own exposure, and is made — and is called upon to testify regarding an incident that occurred 15 minutes — during a period of 15 minutes to a half hour four years prior, and is asked to testify as the exactly what happened. Well, his recollection is going to be guided both by [35] passage of time and by a certain amount of instinct for self preservation to avoid saying things that confront the plaintiff with statements that might either make him personally liable or perhaps make his employer liable for statements that had been made — that could have made, for instance, Caesar's Palace liable for libel made by an employee in the course and scope of his duties.

There is an inevitability about the discrepancies between what Mr. LaFontaine has testified the sources told him and what the sources testified occurred during those conversations. You'll note that source one had a hazy recollection about something about ice tongs, but really couldn't testify very much about, didn't really recall very much about it.

Source four was somebody who made it clear that he really didn't recall very much about any conversation that had occurred four years prior, but that he couldn't testify very much anyway because he worked for the Defense Department and it was all classified. Well, if that's the kind of testimony that we can expect, I don't think that source four is going to be a guide to whether or not Mr. LaFontaine fabricated his contact with source four.

If we want — I mean, we don't want to fabricate anything, we wouldn't. My clients would not fabricate. There is no

evidence really that that took place here, Your Honor. And if they wanted to fabricate, if people wished to do so, there are many people that that have died between 1990 and 1994. All that had to be done was put in a dead person if we were so [36] eager to fabricate. Nobody would want to do that. Nobody is interested in committing perjury on behalf of their employer here.

The discrepancies between the information that was provided by the sources and what was published really don't change the gist and sting of the article as a whole. The discrepancies, although when held up and looked at closely, appear substantial, when read in the sense of the contents of the entire article, do not really advance the gist and sting of the defamation, Your Honor, they do not constitute clear and convincing evidence of actual malice, which is what the court needs to find.

Ultimately, Your Honor, the defendants challenge in presenting this case is to somehow show from a record that is 90 percent paper that this case happened in a context, and we've tried to do that in the proposed findings of fact and conclusions of law that we've submitted. The context that we've tried to explain is that one of the leading comedy performers in the country has been accused by a reputable business organization, a major Las Vegas casino, of drug use and bizarre and erratic conduct during the time that he was in Las Vegas. And that there was a reason for this. That was true and that is true, Your Honor.

Mr. Dangerfield's conduct in Las Vegas during that week have been documented in great detail. We think that we've demonstrated that Mr. Dangerfield was behaving in a way that

was erratic, that was rude, that involved heavy substance abuse, and for which the reputational injury that he has suffered is the [37] natural and probable consequences of that.

Plaintiff, Your Honor, has argued that there is some obligation on the court of finding damage, even in the absence of any evidence of damage. Well, Your Honor, there is a doctrine in which that occurs, and it's called nominal damages. The idea that damages presumed doesn't mean that you presume a million dollars or two million or 100 million or — there has to be a factual foundation, there has to be some kind of limiting principle; otherwise, the popularity or unpopularity of the speaker of speech will be the guide to the court's decision. And that's contrary to all kinds of fundamentals of the way that communications in this country are not governed by the government system. It's intended that the consequences of speech should be the same regardless of who it is that speaks.

This presumed damages claim is something that should not be used on this record. This is the antithesis of a record in which you can presume any sort of substantial damage from this publication when you have this context.

Your Honor, Mr. Grossenbacher and I would like to thank you again for your patience and your attention during the course of this.

THE COURT: Thank you. Now for plaintiff's closing argument.

MR. LANGBERG: Sorry, Your Honor?

THE COURT: Your last argument.

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MR. LANGBERG: Yes, thank you, Your Honor.

Your Honor, in the case of West Moreland Versus CBS, at 596 F.Supp. 1170, the Southern District of New York, the [38] court made an interesting observation. It talked about a reporter's work and what might be sufficient for constitutional malice. And the court said:

> If he knowingly or recklessly misstates that evidence to make it seem more convincing or condemnatory than it is; if, for example, a publication asserts falsely and without basis that the charge was confirmed by an eyewitness; if in the editing process it distorts statements of witnesses so they seem to say more than in fact what was said.

Your Honor, that's what happened here. The creation of eye witnesses. Masson nowhere limits itself to quotations by the person speaking and not by third parties. Clear, powerful fabrication.

Your Honor, specifically addressing certain of the points that counsel made. He talked about GP Group having no liability and no participation in the publication process. I suggest that the deposition testimony makes it clear that they do. Just one example of that, Your Honor.

Mr. Galpern's deposition, the most recent deposition, at Page 37:

> "QUESTION: Is it fair to say that American Media Operations, Inc. is not attempting to

make Star Editorial, Inc. a profit center, but instead pays Star Editorial, Inc. what's necessary to run the operation?

"ANSWER: That's correct."

[39] Your Honor, they're paying the employees. They are paying the employees of Star Editorial, Inc. Then after those employees, paid by American Media Operations, write their articles, American Media Operations gets the articles and turns them into a magazine and distributes it. That is publication in the truest sense of libel law. And they are libel and responsible for it. And then after they distribute it they collect the money for it. They are the principal primary publishers in as the word is used in libel law.

Your Honor, if the court feels that it would be helpful, after hearing these arguments, to brief that issue, obviously I would be happy to do it.

Counsel suggested that there is a common law presumption that goes to the burden of producing evidence. It does not. It's a conclusive presumption of injury to reputation once certain elements have been proved, which we have proved in this case. He says that we didn't proof falsity. Mr. Dangerfield, in his deposition which is in evidence and on the stand denies the events, no one says they happened. How else can you proof falsity? Even Mr. LaFontaine has no idea where some of these things came from. The confidential sources have no idea where any of these things came from. That's falsity. Fabrication.

Counsel assumes that he has somehow conclusively proved a number of charges about Mr. Dangerfield. Now, I submit to

the court that they don't amount to — even if he did prove them all, they don't amount to what this article says. But when we read Mr. Borg's deposition, for example, first of all, in one [40] deposition he says, Yes, I saw Mr. Dangerfield use cocaine, and in another deposition under oath he says, No, I didn't ever see him use cocaine. And he's talking about the same time period.

So I don't know what to believe about Mr. Borg. But except for that one thing that, one comment about cocaine in his second deposition, Mr. Borg contradicts virtually everything that these people are trying to say happened. He says Mr. Dangerfield was never rude — and this is a man who is with Mr. Dangerfield as his road manager for years — Mr. Dangerfield was never rude to patrons and clients. He said that the crew at the hotel liked Mr. Dangerfield, according to Mr. Borg.

And if we read the testimony of Mr. Beam, the security guard that was assigned to Mr. Dangerfield, we get the same kind of testimony: no evidence of any kind of drug use or anything else.

They have a good deal of hearsay evidence. I guess if Casey Casabeir testified that she was in Mr. Dangerfield's room, and someone else says that she made a call from Mr. Dangerfield's room to a known drug user, never either of them mentioning Mr. Dangerfield's participation in the event ever once, somehow Mr. Dangerfield now becomes a drug user, a drug dealer. I don't know what he becomes by virtue of that. Obviously it's not evidence that's very compelling.

Your Honor, I think that in Liberty Lobby, Justice Scalia made one particularly succinct statement that's relevant to what we're talking about here:

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> "To begin with we cannot envision how a court would go about determining that someone's reputation has [41] already been irreparably damaged; in other words, that no new reader could be reached by the precious libel. More important, however, no significant First Amendment values would be furthered by the rule."

Your Honor, there was known fabrication here. It was flagrant. It was by Mr. LaFontaine at one level, unless all of the sources are perjuring themselves and he's the only one telling the truth. It was by Mr. Levine at the next level, and there's no question, I don't see how — I don't see any question Mr. Levine fabricated a tremendous amount of the material in that article. And I was surprised actually to hear counsel defending the article in general when he himself before this court has already admitted that the ice tongs incident never happened. So there can't be any truth to that incident.

I suggest, Your Honor, if you consider the emotional distress, if you consider the significance of the statements that were made, the specificity, the eye witness accounts, the addition of elements of lewd and lascivious conduct and violence that were not present in any other articles ever published that we've seen, that the case cries out for a significant award of compensatory damages, an award of at least a million dollars in compensatory damages, and ten percent of their low value net worth, would be about three and a half million dollars.

I don't think that a wealthy publication that generates huge amounts of cash, and tremendous profits for its owners, should be able to do it on the basis of intentional [42] fabrication. It's just not right.

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Your Honor, I too would like to thank you for your patience in the case. I appreciated being before the court.

THE COURT: Patience I give you readily. The decision is going to be a little more difficult.

With the arguments that you have now concluded with in this case, I'm going to take the matter under submission, and I'm going to ask that you return — I think I can come back with a decision as early as tomorrow at two p.m. I'll ask that you return at two p.m. In the event I run into a problem, we'll certainly get ahold of you. But anticipate a return to this court at two p.m. tomorrow, at which time I'll give you a decision in this case.

MR. LANGBERG: Thank you.

THE COURT: All right. The matter stands submitted untii tomorrow.

MR. COX: Thank you, Your Honor.

THE CLERK: Court now stands in recess.

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